No. 16-399

Title:	Anthony W. Perry, Petitioner v. Merit Systems Protection Board
Docketed:	September 27, 2016
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(14-1155)
Decision Date:	July 22, 2016

Questions Presented

DATE	PROCEEDINGS AND ORDERS
Sep 27 2016	Petition for a writ of certiorari filed. (Response due October 27, 2016)
Oct 21 2016	Order extending time to file response to petition to and including November 28, 2016.
Nov 14 2016	Order further extending time to file response to petition to and including December 5, 2016.
Dec 05 2016	Brief of respondent Merit Systems Protection Board in opposition filed.
Dec 20 2016	Reply of petitioner Anthony W. Perry filed.
Dec 21 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 09 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED.
Feb 14 2017	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for the petitioner.
Feb 17 2017	SET FOR ARGUMENT ON Monday, April 17, 2017.
Feb 22 2017	Record requested from U.S.C.A. for the D.C. Circuit.
Feb 27 2017	Record received from U.S.C.A. for the D.C. Circuit. The record is electronic.
Feb 27 2017	Joint appendix filed. (Statement of costs filed.)
Feb 27 2017	Brief of petitioner Anthony W. Perry filed.
Mar 03 2017	Brief amicus curiae of Metropolitan Washington Employment Lawyers Association (MWELA) filed.
Mar 17 2017	Record received from the Merit Systems Protection Board (1 box).
Mar 22 2017	CIRCULATED.
Mar 29 2017	Brief of respondent Merit Systems Protection Board filed. (Distributed)
Apr 10 2017	Reply of petitioner Anthony W. Perry filed. (Distributed)
Apr 17 2017	Argued. For petitioner: Christopher Landau, Washington, D. C. For respondent: Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 23 2017	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Gorsuch, J., filed a dissenting opinion, in which Thomas, J., joined.
Aug 07 2017	Record from the U.S. Merit Systems Protection Board has been returned.

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RECORD AND BRIEFS

16-399

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Merit Systems Protection Board (MSPB) is authorized to hear challenges by certain federal employees to certain major adverse employment actions. If such a challenge involves a claim under the federal anti-discrimination laws, it is referred to as a "mixed" case. This case presents the following question:

> Whether an MSPB decision disposing of a "mixed" case on jurisdictional grounds is subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit.

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INTRODUCTION

This case presents this Court with an opportunity to finish the job it started in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012): to bring coherence and clarity to the statutory regime governing judicial review of decisions by the Merit Systems Protection Board (MSPB or Board). That regime, as this Court explained in *Kloeckner*, bifurcates judicial review of MSPB decisions "in crystalline fashion." *Id.* at 604. Decisions in cases challenging certain major adverse employment actions under the federal civil-service laws are reviewed in the U.S. Court of Appeals for the Federal Circuit, whereas decisions in "mixed" cases challenging such actions at least in part under the federal anti-discrimination laws are reviewed in district court. *See id.* Here, as in *Kloeckner*, that simple point should have been the beginning and the end of the matter—petitioner challenged major adverse employment actions under the federal anti-discrimination laws, and hence the MSPB's decision is subject to judicial review in district court.

The D.C. Circuit, however, routed this appeal to the Federal Circuit on the theory that the MSPB disposed of the case on threshold jurisdictional grounds without reaching the merits of petitioner's discrimination claim. But *Kloeckner* specifically rejected the argument that district courts may review only those cases in which the MSPB actually reached the merits of a discrimination claim. *See id.* That argument, this Court explained, has no basis in the statute, which distinguishes only between "kind[s] of cases" (pure civil-service cases vs. "mixed" cases), not the ground on which the MSPB resolved a particular case. *Id.* Thus, *Kloeckner* held, MSPB

decisions in "mixed" cases are subject to review in district court *regardless* of whether the agency reached the merits of a discrimination claim or disposed of the case on non-merits procedural grounds. "[T]he merits-procedure distinction is a contrivance, found nowhere in the statute's provisions on judicial review." *Id.*

The decision below applies a distinction even more contrived than the merits-procedure distinction rejected in *Kloeckner*. Notwithstanding *Kloeckner*, the D.C. Circuit held that it was bound by pre-*Kloeckner* circuit precedent to send MSPB decisions disposing of "mixed" cases on jurisdictional (as opposed to procedural) grounds to the Federal Circuit instead of a district court. The Federal Circuit similarly has applied a jurisdiction-procedure distinction after *Kloeckner*, and thereby expanded its own jurisdiction over MSPB appeals. *See Conforto v. MSPB*, 713 F.3d 1111, 1115-21 (Fed. Cir. 2013). Both the Second and Tenth Circuits endorsed that distinction before *Kloeckner*, *see Downey v. Runyon*, 160 F.3d 139, 146 (2d Cir. 1998); *Harms v. IRS*, 321 F.3d 1001, 1007-08 (10th Cir. 2003), while the Eighth Circuit specifically rejected it in *Kloeckner* itself, *see Kloeckner v. Solis*, 639 F.3d 834, 838 (8th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 596 (2012).

The decisions applying a jurisdiction-procedure distinction have no basis in the statutory text, subvert the statutory objective of providing *de novo* trials in district court for discrimination claims, and and plunge a straightforward statutory scheme into a morass of complexity. The Government itself conceded in *Kloeckner* that the jurisdiction-procedure distinction "has no basis" in the statute, and is

"difficult and unpredictable" to apply in practice. Brief for Respondent at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261 at *25 n.3; Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted). Given that the Government has disavowed the very distinction on which the court below relied, and this Court has characterized that distinction as "confusing," *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010), this case warrants this Court's review. A distinction that is "hazy at best and incoherent at worst" deprives both courts and federal employees (many, if not most, of whom proceed *pro se*) of the necessary "clear guidance about the proper forum for the employee's claims at the outset of the case." *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2134 (2012).

In this absence of review in this case, however, it is difficult to see how the situation will be resolved. The MSPB is bound to follow Federal Circuit law in this area, and thus directs aggrieved employees whose "mixed" cases are dismissed on jurisdictional grounds to seek review in that court. This petition reaches this Court only by serendipity: (1) petitioner, then proceeding *pro se*, sought review in what everyone—including petitioner—now acknowledges was the wrong court: the U.S. Court of Appeals for the D.C. Circuit, and (2) that court appointed counsel to present petitioner's jurisdictional arguments. This petition thus provides this Court with a unique vehicle to clarify the law in this area once and for all.

This Court has long recognized that the question whether an MSPB decision is to be appealed to a

district court or, alternatively, to the Federal Circuit is a matter of "substantial importance," *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 771 (1985), given the millions of federal employees. Insofar as the D.C. Circuit is correct that *Kloeckner* did not expressly answer the question of which court reviews "mixed" cases dismissed by the MSPB on jurisdictional grounds, this Court should do so now. Few things are more wasteful than litigation over the proper court in which to litigate. Accordingly, this Court should grant this petition and reverse the judgment.

OPINIONS BELOW

The D.C. Circuit's opinion has not yet been published in the Federal Reporter, but is reported at 2016 WL 3947838 and reprinted in the Appendix ("App.") at 1-15a. The MSPB's most recent decision is reported at 2014 WL 5358308, and reprinted at App. 20-31a. The Administrative Law Judge's most recent decision is unreported, and reprinted at App. 32-58a. The MSPB's original decision is reported at 2013 WL 9678428, and reprinted at App. 59-70a. The Administrative Law Judge's original decision is unreported, and reprinted at App. 71-80a.

JURISDICTION

The D.C. Circuit entered judgment on July 22, 2016. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the Appendix, App. 90-99a.

STATEMENT OF THE CASE

A. Background

Petitioner Anthony W. Perry was hired by the U.S. Census Bureau in Suitland, Maryland, in 1982, and worked for that agency for the next thirty years. App. 3a. In the mid-2000s, Perry developed osteoarthritis in his lower back and hip. *Id.* To help Perry manage the pain, his supervisor allowed him to take breaks during normal working hours and to make up missed time or complete outstanding projects after hours. *Id.* Around the same time, Perry filed a series of Equal Employment Opportunity actions alleging employment discrimination based on race and age. App. 34a, 38a.

On June 7, 2011, Perry received a Notice of Proposed Removal from a Census employee who was not his direct supervisor. The Notice proposed to terminate Perry's employment, alleging that he had been absent during regular working hours and thus had been paid for hours he had not worked. Perry contested the charges and pointed to the informal accommodation that his supervisor had provided and his unblemished disciplinary record.

In August 2011, Perry and the agency entered into a settlement agreement that required him to serve a suspension for thirty calendar days, retire no later than September 4, 2012, and forfeit his discrimination claims against the agency. App. 35-38a.

B. Proceedings Below

After Perry served his 30-day suspension and his retirement took effect, he filed a *pro se* challenge with the Board. An administrative law judge (ALJ),

ordered him to show cause why the challenge should not be dismissed for lack of jurisdiction. App. 81-89a. "Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board," App. 82a, and "the Board cannot review the same claims over which you entered into a settlement agreement with the agency," App. 86a. Perry responded that the settlement agreement had been coerced, and that the subsequent major adverse employment actions were thus involuntary.

After reviewing the evidence but without holding a hearing, the ALJ dismissed the challenge for lack of jurisdiction. App. 71-80a. In particular, the ALJ decided that both the 30-day suspension and retirement were voluntary because they resulted from a voluntary settlement agreement. App. 74-76a. Perry petitioned the Board for review.

As relevant here, the Board granted the petition, and remanded the case to the ALJ for further proceedings. App. 59-70a. The Board concluded that Perry had "made a nonfrivolous allegation of involuntariness sufficient to warrant a jurisdictional hearing," App. 66a, and that the ALJ had thus erred by dismissing the case without holding such a hearing, App. 67-70a.

On remand, the ALJ held a hearing and concluded that Perry "failed to prove that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals." App. 33a. Accordingly, the ALJ once again dismissed the appeal for lack of jurisdiction. *See id.* And Perry once again petitioned the Board for review.

This time, however, the Board affirmed the ALJ. App. 20-31a. The Board concluded that Perry "failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because [he] validly waived his appeal rights therein." App. 27a. The Board's decision included a "**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**." App. 30a. That notice stated in pertinent part:

> You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:
>
> United States Court of Appeals
> for the Federal Circuit
> 717 Madison Place, N.W.
> Washington, DC 20439

Id.

Notwithstanding the notice, Perry—still proceeding *pro se*—filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. That court promptly entered an order directing Perry to "show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the United States Court of Appeals for the Federal Circuit." App. 18a. After Perry and the Government both filed briefs on the jurisdictional issue, the D.C. Circuit discharged the show-cause order. App. 16-17a. The court directed the parties to "address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. § 7703(b)(1)(B); and

(2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2)," and appointed counsel as *amicus curiae* "to present arguments in favor of petitioner's position." App. 17a. Judge Henderson dissented from the order, noting that she "would grant [the Government's] request to transfer the case to the Federal Circuit." App. 16a n.*.

In the subsequent briefing, everyone (including petitioner) agreed that the D.C. Circuit lacked jurisdiction. App. 5a. Thus, the only question was whether that court should transfer the case to a district court or the Federal Circuit. *Id.* The D.C. Circuit held, based on pre-*Kloeckner* circuit precedent, that it was constrained to transfer the case to the Federal Circuit. *See* App. 2-3a (citing *Powell v. Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998)). *Powell* was not necessarily incompatible with *Kloeckner*, the court declared, because the MSPB had dismissed the appeal in *Powell* (like the appeal here) on *jurisdictional* grounds, whereas the MSPB had dismissed the appeal in *Kloeckner* on *procedural* grounds. App. 7-15a. "In short," the court concluded, "we remain bound by *Powell*," and thus transferred this case to the Federal Circuit. App. 15a.

The Federal Circuit docketed the appeal, but granted Perry's unopposed motion to hold the briefing in abeyance until this Court resolves the jurisdictional issue presented in this petition. *See* Order [Dkt. 21], *Perry v. MSPB*, No. 2016-2377 (Fed. Cir. Aug. 31, 2016).

REASON FOR GRANTING THE WRIT

Review Is Necessary To Bring Coherence And Clarity To The Statutory Regime Governing Judicial Review Of MSPB Decisions.

The atextual jurisdiction-procedure distinction that the D.C. Circuit applied in this case contravenes the judicial review provisions of the Civil Service Reform Act, 5 U.S.C. § 7703, App. 97-99a, deepens a circuit conflict, and engenders the very confusion about the proper forum for judicial review that this Court sought to put to rest four years ago in *Kloeckner*.

This Court granted certiorari in that case to answer the following question: "If the MSPB decides a mixed case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?" Petition for a Writ of Certiorari at i, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 3584742, at *i. This Court held that the statute provided a clear answer to that question: pure civil-service cases are reviewable in the Federal Circuit, while "mixed" cases involving a discrimination claim are reviewable in district court. *See Kloeckner*, 133 S. Ct. at 603-04.

Section 7703 of the Act, which addresses judicial review of MSPB decisions, generally routes such review to the Federal Circuit "[e]xcept as provided in ... paragraph (2) of this subsection." 5 U.S.C. § 7703(b)(1)(A), App. 97a. Paragraph (2), in turn, specifies that "[c]ases of discrimination subject to the provisions of section 7702 of this title"—*i.e.*, "mixed" cases—shall be filed in district court. *Id.* § 7703(b)(2), App. 98a. And "mixed" cases are those

in which a federal employee or applicant "(A) has been affected by an action which the employee or applicant may appeal to the [MSPB]"—*i.e.*, a major adverse employment action—and "(B) alleges that a basis for the action was discrimination prohibited by" federal anti-discrimination laws. *Id.* § 7702(a)(1)(A), (B), App. 93a. "Ergo, mixed cases shall be filed in district court," regardless of whether the MSPB reached the merits of the discrimination claim or disposed of the case on non-merits grounds. *Kloeckner*, 133 S. Ct. at 604.

This Court dismissed the Government's contrary interpretation of the statute as "tortuous," and based on a misguided policy argument. *Id.* at 607 n.4. The Government argued that it makes sense for the Federal Circuit to review MSPB decisions unless the Board reaches the merits of a discrimination claim, because Congress sought to "'ensur[e] that the Federal Circuit would develop a uniform body of case law governing federal personnel issues.'" *Kloeckner*, 133 S. Ct. at 607 n.4 (quoting Brief for Respondent at 32, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261, at *32). After rejecting that policy argument on its own terms (the Federal Circuit did not even exist when Congress enacted this statutory regime), the Court emphasized that "[i]n any event, even the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text." *Id.*

Although the MSPB's non-merits ground for dismissal in *Kloeckner* was procedural, rather than jurisdictional, both the Government and the petitioner in that case recognized that this is a distinction without a difference. In opposing

certiorari, the Government acknowledged that the "distinction between procedural MSPB dismissals (reviewable in district court) and jurisdictional MSPB dismissals (reviewable only in the Federal Circuit) is 'difficult and unpredictable.'" Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2010) (No. 11-184), 2011 WL 6281813, at *15 (quoting *Kloeckner*, 639 F.3d at 838). As the Government explained:

> The procedural-jurisdictional distinction rests on the premise that an appeal beyond the MSPB's jurisdiction "does not involve 'an action which the employee or applicant may appeal to the [Board]'" under Section 7702(a). But that description applies equally to an appeal, like this one, that is not timely filed. Moreover, as a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [the jurisdiction-procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

Id. at *15-16 (internal citations omitted).

The petitioner in *Kloeckner* agreed with the Government on this score. In her reply to the brief

in opposition, she noted that "[t]he government acknowledges that the significance of the [jurisdiction-procedure] distinction is far from clear, because determining whether an MSPB ruling was procedural or jurisdictional can be 'difficult and unpredictable.'" Reply to Brief in Opposition at 2, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6859422, at *2 (quoting Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), 2011 WL 6281813, at *15). "For example," the *Kloeckner* petitioner continued, "if the MSPB concluded that a claimant had failed to establish a prima facie case of discrimination, the Board and the Federal Circuit would apparently regard that failure as meaning the Board had no jurisdiction over the claim." *Id.* (citing *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir. 2001); *Hill v. Department of the Air Force*, 796 F.2d 1469, 1471 (Fed. Cir. 1986); *id.* at 1472-73 (Newman, J. concurring)).

The Government, for its part, returned to this point in its merits brief:

> [The jurisdiction-procedure] distinction has no basis and petitioner does not ask this Court to adopt it. The reason for creating an exception to the Federal Circuit's exclusive jurisdiction over final MSPB decisions is to allow discrimination claims to be heard in district courts. When the Board disposes of an appeal on grounds that do not touch on discrimination, that exception does not apply, *regardless of whether the decision rests on jurisdictional or procedural grounds.*

Brief of Respondent at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012)(No. 11-184), 2012 WL 2883261, at *25 n.3 (emphasis added).

Notwithstanding the fact that even the *Government* in *Kloeckner* disavowed the jurisdiction-procedure distinction, a divided panel of the Federal Circuit thereafter embraced that very distinction. In *Conforto*, that court held that cases alleging discrimination but dismissed by the MSPB on jurisdictional, as opposed to procedural, grounds are subject to exclusive review in the Federal Circuit. *See* 713 F.3d at 1115-21. The court purported to base that decision on the text of the statute. According to the Federal Circuit, a case that the MSPB dismisses on jurisdictional grounds is not a "mixed" case at all, because the Board has determined that the case is not one in which an employee "'has been affected by an action *which the employee ... may appeal*'" to the MSPB. *Id.* at 1118 (emphasis added; quoting 5 U.S.C. § 7702(a)(1)(A), App. 93a); *see also* 5 U.S.C. § 7513(d), App. 92a ("An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board ...."); *id.* § 7512, App. 90a (listing the "[a]ctions covered" by that section). "[T]he plain import of this statutory language is that a purported mixed case appeal is reviewed by a district court only if the [MSPB] has jurisdiction to decide the appeal from the adverse action in issue." *Conforto*, 731 F.3d at 1118.

But that argument, as Judge Dyk explained in dissent in *Conforto*, "was necessarily rejected in *Kloeckner*," as it "would equally give our court jurisdiction to review procedural issues in mixed cases." 713 F.3d at 1123-24. "As the government

pointed out in *Kloeckner*, an employee also may only appeal to the Board if he does so within the applicable time limits." *Id.* at 1124 (Dyk, J., dissenting); *see also Stahl v. MSPB*, 83 F.3d 409, 412-13 (Fed. Cir. 1996) (employee's untimely claim that removal was based on discrimination not appealable to the Board under § 7702(a)). The statute does not "draw any textual distinction between different types of Board decisions, and there is no other basis for distinguishing between jurisdictional and procedural dismissals." *Conforto*, 713 F.3d at 1124 (Dyk, J., dissenting). If Congress had wanted to send procedural dismissals to district court and jurisdictional dismissals to the Federal Circuit, "it could have just said so." *Kloeckner*, 133 S. Ct. at 605.

Indeed, *Conforto*'s "textual" analysis begs the question. Here, the MSPB held that it lacked jurisdiction over petitioner's appeal on the ground that he had voluntarily entered into the settlement agreement, and thereby waived his right to appeal to the MSPB. App. 26-30a. But whether or not the settlement was voluntary is the key *merits* issue in the case. There is no question that the MSPB has jurisdiction over appeals in which employees contend that a settlement implicating a major adverse employment action was involuntary. *See, e.g.*, *Conforto*, 713 F.3d at 1120 ("The employee in such cases may claim that he was forced to resign or retire in part or in whole because of discrimination by the agency ...."); *Garcia v. Department of Homeland Sec.*, 437 F.3d 1322, 1324 (Fed. Cir. 2006) (*en banc*) (a "facially voluntary action by the employee may actually be involuntary" if coerced by the agency); *Schultz v. United States Navy*, 810 F.2d 1133, 1136

(Fed. Cir. 1987) (coercion established by showing "that the agency knew that the reason for the threatened removal could not be substantiated"). In this context, in short, "the MSPB's jurisdiction and the merits of an alleged involuntary separation are 'inextricably intertwined.'" *Shoaf v. Department of Agr.*, 260 F.3d 1336, 1341 (Fed. Cir. 2001) (quoting *Schultz*, 810 F.2d at 1136); *see also Conforto*, 713 F.3d at 1126-27 (Dyk, J., dissenting).

Thus, in this very case, the MSPB assumed jurisdiction over petitioner's appeal in the first round of litigation and remanded the case to the ALJ to hold a hearing and receive more evidence. App. 59-70a. If that appeal fell within the MSPB's jurisdiction, it necessarily follows that petitioner's subsequent appeal from the decision on remand also fell within the MSPB's jurisdiction. The MSPB's resolution of a challenge to the voluntariness of a settlement cannot retroactively strip the Board of jurisdiction to address that very issue. To the contrary, it is black-letter law that an adjudicatory body does not lack jurisdiction to address a claim simply because the claim may fail on the merits. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682 (1946). In other words, the merits of petitioner's allegation that he was subjected to a major adverse employment action because the settlement was involuntary do not involve the MSPB's "jurisdiction" as this Court has defined that term, whatever label the Board chooses to affix to its decision. *See, e.g., Reed Elsevier*, 559 U.S. at 160-63; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452-56 (2004). And because the MSPB has jurisdiction to decide whether a settlement was voluntary, a case challenging the voluntariness of a settlement

implicating a major adverse employment action qualifies as "an action which the employee or applicant may appeal to the [MSPB]" 5 U.S.C. § 7702(a)(1)(A), App. 93a, *regardless* of the MSPB's resolution of that question on the merits.

The jurisdiction-procedure distinction also renders illogical other parts of the judicial review provisions. The statutory requirement for the Board to decide "mixed" cases within 120 days, *see* 5 U.S.C. § 7702(a)(1), App. 93-94a, would make no sense if there were no way to determine whether a case is "mixed" in the first place unless and until the Board resolved the claim. Rather, that timing provision underscores that the determination of whether a case is "mixed" must occur *at the time of filing*. If a claimant alleges that she has been subjected to a major adverse employment action and seeks relief under the federal anti-discrimination laws, she has brought a "mixed" case *regardless* of whether the Board accepts or rejects her allegations.

That is why, as this Court has explained, the correct forum for judicial review of an MSPB decision turns on "the nature of an employee's claim," not the basis for the MSPB's decision. *Elgin*, 132 S. Ct. at 2134. And this is not merely a technicality: Congress routed cases involving discrimination claims (*i.e.*, "mixed" cases) to district court precisely because the employee has the statutory "right" to have a discrimination claim "subject to trial de novo." 5 U.S.C. § 7703(c), App. 99a; *see also* S. Rep. No. 95-969, at 63 (1978) ("District court is a more appropriate place than the Court of Appeals for [cases involving discrimination claims] since they may involve additional fact-finding."). Civil-service

claims, in contrast, are subject to deferential review under the Administrative Procedure Act (APA), regardless of whether they are standalone claims (and thus subject to review in the Federal Circuit) or paired with discrimination claims (and thus subject to review in district court). *See, e.g.*, *Butler v. West*, 164 F.3d 634, 639 n.10 (D.C. Cir. 1999). A jurisdiction-procedure distinction that routes cases involving discrimination claims, like this one, to the Federal Circuit, and then subjects them to APA review, *see, e.g.*, *Shoaf*, 260 F.3d at 1340, "turns Congress' clear intent on its head," *Conforto*, 713 F.3d at 1127 (Dyk, J., dissenting); *see also* 5 U.S.C. § 7702(e)(3), App. 96a ("Nothing in this section shall be construed to affect the right to trial de novo" of discrimination claims).

And putting aside the lack of textual support for the jurisdiction-procedure distinction, it creates monumental practical difficulties. In particular, it forces MSPB claimants to decide whether their MSPB challenge has been dismissed on "jurisdictional" or "procedural" grounds. Many, if not most, of those claimants proceed *pro se*. *See, e.g.*, U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2017* (Feb. 2016), at 14 ("Generally, at least half or more of the appeals filed with the agency are from *pro se* appellants."), available at http://tinyurl.com/zcv6lxj (last visited Sept. 26, 2016). Even the Nation's most seasoned judges and lawyers have trouble distinguishing "jurisdictional" from "procedural" rulings. *See, e.g.*, *Reed Elsevier*, 559 U.S. at 160-61. "By contrast, a jurisdictional rule based on the type of employee and adverse agency action at issue does not involve such amorphous distinctions." *Elgin*, 132 S. Ct. at 2136.

As this Court has long recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* The plain statutory text provides an administrable bright-line rule: MSPB decisions are generally subject only to APA review in the Federal Circuit, except that MSPB decisions in cases involving discrimination claims are subject to review in district court, where the employee is entitled to a trial de novo on the discrimination claim. *See* 5 U.S.C. §§ 7703(b),(c), App. 97-99a. Period. There is no need to dissect the MSPB decision, or to engage in a metaphysical distinction between "jurisdictional" and "procedural" grounds. The fact that the D.C. Circuit was unable to determine as a ministerial matter the correct court to which to transfer this case, but found itself constrained to appoint an *amicus* to brief this jurisdictional issue, underscores that the law in this area requires clarification.

The decision below, it is worth emphasizing, did not endorse *Conforto*'s jurisdiction-procedure distinction. Rather, the decision below rested on the entirely different ground that pre-*Kloeckner* circuit precedent compelled the result in this case. *See* App. 15a (citing *Powell*, 158 F.3d at 599-600). Because *Kloeckner* did not specifically address the jurisdiction-procedure distinction, the court concluded, *Powell* remained binding circuit law. *Id.* Regardless of whether that conclusion is correct as a matter of D.C. Circuit law, this Court obviously is not similarly constrained.

And the courts of appeals are squarely divided on this issue. The D.C. Circuit and the Federal Circuit have now the joined the Second and Tenth Circuits, which held—even before *Kloeckner*—that the statute bifurcates judicial review of MSPB decisions based on a jurisdiction-procedure distinction. *See* App. 5-15a; *Conforto*, 713 F.3d at 1115-21; *Harms*, 321 F.3d at 1007-08; *Downey*, 160 F.3d at 146. The Eighth Circuit, however, specifically rejected that distinction in the decision later reversed—on other grounds—in *Kloeckner*. *See Kloeckner*, 639 F.3d at 838 (rejecting the jurisdiction-procedure distinction applied in *Harms* and *Downey* as resting on "an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions"), *rev'd on other grounds*, 133 S. Ct. 596.

In any event, a circuit conflict is not an end in itself, but a red flag signaling an issue that warrants this Court's clarification. Here, another such red flag is the fact that the Government has taken diametrically opposed positions on this precise issue in this Court in *Kloeckner* and in the lower courts in this case and in *Conforto*. If the Government cannot speak with a single voice on this issue, it is a sure sign that this Court's clarification is warranted.

Indeed, in the absence of this Court's review, it is difficult to see how this issue will ever be clarified. As noted above, the Federal Circuit has held that it has exclusive jurisdiction to review MSPB decisions in mixed cases, like this one, that are dismissed on jurisdictional grounds. *See Conforto*, 713 F.3d at 1115-21. And because the MSPB is bound by the Federal Circuit in this area, *see* 5 U.S.C. § 7703(b)(1), App. 97-98a; 28 U.S.C. § 1295(a)(9); *Elgin*, 132 S. Ct.

at 2131, the Board specifically instructs claimants whose cases are dismissed on jurisdictional grounds (like petitioner) to seek review there. *See* App. 30a ("You have the right to request review of this final decision *by the United States Court of Appeals for the Federal Circuit.*") (emphasis added). The MSPB further refers litigants to the Federal Circuit's website, and in particular to that court's "Guide for Pro Se Petitioners and Appellants." App. 31a. That document, in turn, addresses "Discrimination claims in Merit Systems Protection Board cases," and states that district courts, as opposed to the Federal Circuit, "have jurisdiction over cases involving bona fide claims of discrimination ... that were raised before *and considered by* the [MSPB]." U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants* § 6 at 167, available at http://tinyurl.com/hntdsja (last visited Sept. 26, 2016) (emphasis added). That is precisely the position that this Court rejected four years ago in *Kloeckner*.

This Court need not and should not delay review to await further percolation on a matter that the Federal Circuit has decided falls within its exclusive jurisdiction. If a claimant were to file a "mixed" case like this one in federal district court, and that court were to transfer the case to the Federal Circuit per *Conforto*, that decision would not be appealable to the regional circuit. *See, e.g.*, *Miller v. Toyota Motor Corp.*, 554 F.3d 653, 655 (6th Cir. 2009); *FDIC v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). This petition arises only by the happenstance that Perry, proceeding *pro se*, mistakenly filed in the D.C. Circuit instead of (per the MSPB's instructions) the Federal Circuit, and the D.C. Circuit decided to

appoint counsel to address the jurisdictional issue rather than simply dismissing the case or transferring it to the Federal Circuit. This petition thus provides this Court with a unique vehicle to clarify this area of the law.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

September 27, 2016

Respectfully submitted,

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 2015

Decided July 22, 2016

No. 14-1155

ANTHONY W. PERRY,
PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD,
RESPONDENT

On Petition for Review of a Decision
of the Merit Systems Protection Board

Rebecca Taibleson, appointed by the court, argued the cause for petitioner. With her on the briefs were *Devin S. Anderson* and *Christopher Landau*, all appointed by the court.

Anthony W. Perry, pro se, filed the brief for petitioner.

Stephen W. Fung, Attorney, Merit Systems Protection Board, argued the cause and filed the brief for respondent.

Before: GRIFFITH, SRINIVASAN and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: When a federal agency takes a significant adverse employment action against an employee, the employee can appeal to the Merit Systems Protection Board. If the Board then rules against the employee, she can seek review of the Board's decision in a federal court. But which federal court? That is the question we confront in this case. There are two possible answers: the Federal Circuit or a federal district court.

As a general matter, Board decisions are reviewed in the Federal Circuit. An exception to that default rule arises with so-called "mixed cases." Mixed cases are ones in which an employee not only challenges an adverse action within the Board's jurisdiction but also alleges discrimination in violation of certain federal statutes. If the Board in a mixed case rules against the employee on the merits of her discrimination claim, she must seek review in district court, not the Federal Circuit.

Our court has held, though, that the mixed-case exception does not apply if the Board dismisses the employee's appeal for lack of jurisdiction without reaching the merits of her discrimination claim. In that circumstance, review lies in the Federal Circuit rather than district court. *Powell v. Dep't of Def.*, 158 F.3d 597 (D.C. Cir. 1998). This case involves exactly that situation. So in the normal course, our precedent in *Powell* would straightforwardly dictate transferring this case to the Federal Circuit.

It turns out the path is not so straightforward because of the Supreme Court's intervening decision in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012). In *Kloeckner*,

the Court held that when the Board dismisses a mixed-case appeal without reaching the merits on a procedural ground—there, untimeliness—judicial review resides in district court (as when the Board reaches the merits), not the Federal Circuit. The question we now address is whether *Kloeckner* effectively overruled our decision in *Powell*. That is, does *Kloeckner*'s result for pre-merits *procedural* dismissals eviscerate *Powell's* contrary result for pre-merits *jurisdictional* dismissals?

We find that the answer is no, and that we remain bound by our precedent in *Powell*. We therefore transfer this case to the Federal Circuit.

I.

Anthony Perry, the appellant in this case, worked for the Census Bureau until 2012. In 2011, the Bureau sent Perry a memorandum notifying him that he would be terminated because of problems with his attendance. The Bureau alleged that Perry had refused to document his hours properly and had been absent from his desk for hours at a time. Perry responded, explaining that he had an informal agreement with his supervisor allowing him to take walking breaks during the workday due to his osteoarthritis.

In August 2011, Perry entered into a settlement agreement with the Bureau. The agreement settled the disciplinary action in exchange for Perry's early retirement and his completion of a thirty-day suspension. It also required Perry to dismiss discrimination claims he had separately filed with the Equal Employment Opportunity Commission. Although Perry later expressed his desire to continue

working, he retired in April 2012 per the settlement agreement.

Perry then appealed his suspension and retirement to the MSPB. He alleged that the Bureau's complaints about his performance resulted from discrimination based on his race, age, and disability, and also constituted retaliation against him for bringing his discrimination claims. Perry further claimed that, because of the discrimination and because the Bureau had misrepresented his appeal rights, his settlement agreement with the Bureau had been coerced.

The MSPB's jurisdiction hinged on Perry's claim that the settlement had been involuntary: because the Board generally lacks jurisdiction to review voluntarily accepted actions, *see* 5 U.S.C. § 7512(1)-(5); 5 C.F.R. § 752.401(b)(9); *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006), its jurisdiction in this case depended on the validity of Perry's contention that the settlement—and hence, the resulting suspension and retirement—had been involuntary. An administrative law judge rejected Perry's claims of coercion, finding that the retirement and suspension had been imposed pursuant to a voluntary agreement. The judge thus dismissed the case for lack of jurisdiction. The MSPB, after remanding the case once for reasons not relevant here, affirmed the dismissal for lack of jurisdiction.

Perry, proceeding pro se, filed a petition for review of the Board's dismissal in this court. We appointed an amicus curiae to present argument on whether this court has jurisdiction, and, if not, whether the case should be transferred to the Federal Circuit or a federal district court. Because Perry has fully joined

amicus's arguments on those issues, we will refer to them collectively as Perry.

II.

The question we confront is which federal court has jurisdiction to review the Board's dismissal of Perry's case. We can quickly rule out one court—ours. Although Perry initially petitioned for review in this court, he now acknowledges that this court lacks jurisdiction. The Board agrees, and so do we. The statute under which Perry initially brought the case to us, 5 U.S.C. § 7703(b)(1)(B), allows for jurisdiction in any court of appeals over cases in which the employee exclusively makes whistleblower claims. That provision, as all parties agree, has no application to this case.

Although this court lacks jurisdiction, we can transfer the case to a court in which it could have been brought originally. *See* 28 U.S.C. § 1631. And while the parties agree that the case should be transferred from here, they disagree about where it should go. Perry contends that jurisdiction to review the Board's decision lies in federal district court. The Board argues that the case instead belongs in the Federal Circuit. We conclude that our precedent requires transferring the case to the Federal Circuit.

Before turning to which court has jurisdiction to review the MSPB's decision, we briefly set out which cases can go to the Board in the first place. Not every type of adverse employment action can be appealed to the Board. Rather, to come within the Board's jurisdiction, the action must be sufficiently serious—e.g., a termination or a suspension of longer than fourteen days. *See* 5 U.S.C. §§ 7512, 7513(d). Additionally, as explained, the contested action

generally cannot have been voluntarily undertaken by the employee.

Let's assume the employee brings to the Board a case that meets those criteria and thus lies within the MSPB's jurisdiction. If the Board renders a decision against her, she may seek judicial review pursuant to the Civil Service Reform Act, 5 U.S.C. § 1101 *et seq.* As a general matter, review of Board decisions lies in the Federal Circuit. 5 U.S.C. § 7703(b)(1)(A). There is an exception to that rule for certain "[c]ases of discrimination," as to which review lies in federal district court. *Id.* § 7703(b)(2).

The statute defines the cases falling within that exception as ones in which an employee "(A) has been affected by an action which [she] may appeal to the Merits Systems Protection Board, and (B) alleges that a basis for the action was discrimination prohibited by" enumerated federal laws. *Id.* § 7702(a)(1). Such cases have come to be known as "mixed cases." *E.g.*, *Kloeckner*, 133 S. Ct. at 602, 604. The upshot is that, whereas review of MSPB decisions normally resides in the Federal Circuit, "mixed cases—those appealable to the MSPB and alleging discrimination"—"shall be filed in district court." *Id.* at 604.

But where should an employee seek judicial review in a situation in which she brought to the MSPB what she believed was a mixed case, but the Board dismissed her appeal for lack of jurisdiction upon deciding that the case was not in fact "appealable to the MSPB"? *Id.* That happened here: Perry sought review in the MSPB of a case in which he "alleg[ed] discrimination," *id.*, but the Board dismissed his appeal for lack of jurisdiction based on a conclusion

that his retirement and suspension had been voluntary.

We previously faced the same situation in *Powell v. Department of Defense*, 158 F.3d 597. There, after concerns had been raised about Lawana Powell's absences from work, she agreed to a transfer to a temporary position which expired soon thereafter. *Id.* at 597. Powell appealed to the MSPB, arguing that her separation had been involuntary and that the agency had discriminated against her. *Id.* The Board dismissed her appeal for lack of jurisdiction upon finding that her acceptance of the transfer had been voluntary. *Id.* at 597-98. She sought review in district court on the assumption that her case was a mixed case. But the district court "ruled that Powell's case was not a true mixed case because it included only a discrimination claim and not a Board-jurisdictional claim." *Id.* at 598. We agreed, holding that the Federal Circuit—not the district court—was the proper forum for Powell's appeal. *Id.* at 599-600.

Powell is materially indistinguishable from this case. Like Powell, Perry resolved a disciplinary issue by agreeing to a significant employment action that could be appealed to the Board if involuntary (in this case, mandatory retirement and a thirty-day suspension). Like Powell, Perry then claimed that his agreement had been involuntary due to discrimination. As in *Powell*, the Board disagreed, finding that the agreement was voluntary and thus dismissing the appeal for lack of jurisdiction. And like Powell, Perry contends that review of the Board's dismissal lies in district court. We rejected that argument in *Powell*. As a result, unless there has been some controlling change in the law in the interim, our precedent in that

case would require us to conclude that Perry's appeal, like Powell's, belongs in the Federal Circuit rather than in district court.

Perry argues that *Powell* no longer binds us because of the Supreme Court's intervening decision in *Kloeckner v. Solis*, 133 S. Ct. 596. As we have explained, "a circuit precedent eviscerated by subsequent Supreme Court cases is no longer binding on a court of appeals." *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988). "The question" for us is whether the intervening Supreme Court decision "effectively overrules, *i.e.*, 'eviscerates'" our prior precedent. *United States v. Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999) (alteration omitted) (quoting *Dellums*, 863 F.3d at 978 n.11), *abrogated on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000). Here, consequently, we ask whether *Kloeckner* "effectively overrules" or "eviscerates" *Powell*, such that *Powell* is incompatible with *Kloeckner*. We conclude it does not.

For starters, all sides agree that *Kloeckner* did not involve the precise issue raised by both this case and *Powell*. *See* Amicus Reply Br. 9-10 n.2; Respondent Br. 18-21. In the latter cases, the Board dismissed the employee's appeal for lack of jurisdiction, holding that it could not hear the appeal because the challenged action was voluntary. *See Powell*, 158 F.3d at 597-98. *Kloeckner* did not involve a jurisdictional dismissal. There was no doubt that Kloeckner alleged an adverse action within the Board's jurisdiction—she had been fired. *Kloeckner*, 133 S. Ct. at 602. The Board instead dismissed her claim on the procedural ground of untimeliness. *Id.* at 603. And each time the *Kloeckner* Court described the question before it, it specifically

defined the issue by reference to MSPB dismissals on "procedural grounds." *Id.* at 600, 602, 603, 607.

The Court did so, moreover, with awareness of the potential distinction between procedural and jurisdictional dismissals. In explaining that it had granted review to "resolve a Circuit split on whether an employee seeking judicial review should proceed in the Federal Circuit or in a district court when the MSPB has dismissed her mixed case on procedural grounds," the Court cited—as the cases making up the district-court side of the split—decisions from the Second and Tenth Circuits. *Id.* at 603 & n.3 (citing *Harms v. IRS*, 321 F.3d 1001 (10th Cir. 2003); *Downey v. Runyon*, 160 F.3d 139 (2d Cir. 1998)). And in both of those decisions, the courts of appeals had suggested a distinction between procedural and jurisdictional dismissals. *See Harms*, 321 F.3d at 1007-08; *Downey*, 160 F.3d at 145-46. In *Harms*, the Tenth Circuit expressly drew a divide between "dismissals by the MSPB on procedural ... grounds," which it held must be appealed to district court, "as opposed to [dismissals on] jurisdictional[] grounds," which under that court's precedent must go to the Federal Circuit. 321 F.3d at 1007. The Supreme Court in *Kloeckner*, aware of the Tenth Circuit's decision in *Harms*, repeatedly said that it was addressing only the proper forum for appealing MSPB dismissals on "procedural grounds."

In the oral argument in *Kloeckner*, the Justices' questions likewise manifested awareness of the potential distinction between procedural and jurisdictional dismissals. Justice Sotomayor, after noting that "[e]very circuit court unanimously holds that jurisdictional dismissals should go only to the Federal Circuit," suggested that the argument for

Federal-Circuit jurisdiction "has more legs" in the jurisdictional context because "[t]he point is that you're only permitted to go to district court on issues of discrimination that are within the Board's jurisdiction." Transcript of Oral Argument at 21-22, *Kloeckner,* 133 S. Ct. 596 (No. 11-184) (Resp. Supp. App. 22-23). Similarly, Justice Kagan—who would later author the Court's unanimous opinion—observed that there "seem[ed] to be a good deal of difference between the question, what happens to something that is clearly a mixed case, and alternatively, the question of whether something is a mixed case; that is, whether it includes a claim about an action which the employee may appeal to the MSPB." *Id.* at 23-24 (Resp. Supp. App. 24-25). She suggested that "one could think that questions about what can be appealed to the MSPB ought to go to the Federal [C]ircuit under this statutory language in a way that questions that are involved in this case do not." *Id.* at 24 (Resp. Supp. App. 25).

Of course, we do not mean to suggest that statements made in the course of questioning at oral argument can profitably be parsed for reliable indications of the speaker's position on the subject addressed. We therefore do not cite the Justices' questions during the *Kloeckner* oral argument in support of the proposition that they had necessarily decided there is a material distinction between procedural and jurisdictional dismissals (with the former appealed to district court and the latter to the Federal Circuit). Rather, the Justices' questions—like the Court's citation of the Second and Tenth Circuits' opinions—indicate something more modest: *awareness* of the possibility of such a distinction. In that light, we understand *Kloeckner*'s repeated (and consistent)

references to "procedural" dismissals to have been made in the context of awareness of an argument that jurisdictional dismissals are different.

Of course, even though *Kloeckner* involved procedural rather than jurisdictional dismissals, and even assuming the Court fashioned its decision with awareness that the distinction might be a material one, in theory the Court still might have "effectively overrule[d]" our precedent in *Powell* if its decision in fact turned out to be incompatible with *Powell*. *Williams*, 194 F.3d at 105; *see Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 664-66 (D.C. Cir. 2013). But unless *Powell* has been eviscerated in that manner, we, as a panel, have no leeway to depart from it. We find no such incompatibility here. In reaching that result, we agree with the one other court of appeals to have addressed the same issue: the Federal Circuit has held that its pre-*Kloeckner* decisions directing appeals from MSPB jurisdictional dismissals to its own court remain good law in the wake of *Kloeckner*. *Conforto v. MSPB*, 713 F.3d 1111, 1116-19 (Fed. Cir. 2013). We arrive at the same conclusion about our own parallel precedent in *Powell*.

In finding that *Powell* is not necessarily incompatible with *Kloeckner*, we focus on the statute's description of a mixed case. Recall that an appeal from an MSPB decision generally belongs in the Federal Circuit unless the case appealed from is a mixed case, in which event review lies in the district court. The statute describes a mixed case as one in which the employee both alleges discrimination and "has been affected by an action which [she] *may appeal* to the" MSPB. 5 U.S.C. § 7702(a)(1)(A) (emphasis added). *Kloeckner* thus describes "mixed cases" as "those

appealable to the MSPB and alleging discrimination." 133 S. Ct. at 604 (emphasis added).

The emphasized statutory language suggests a distinction between jurisdictional dismissals (like those in this case and *Powell*) and procedural dismissals (like the one in *Kloeckner*). *See Conforto*, 713 F.3d at 1118. As to the former, when an employee brings a case she believes qualifies as a mixed case to the MSPB but the Board dismisses her appeal based on a lack of jurisdiction, the Board necessarily concludes that she has not "been affected by an action which [she] may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). She instead has been affected by an action which she may *not* appeal to the MSPB. The case, in other words, turns out not to be a mixed case after all—it is not one "appealable to the MSPB." *Kloeckner*, 133 S. Ct. at 604.

When the Board dismisses an appeal on a procedural ground, however, the case may still be viewed as one in which the employee was "affected by an action which [she] may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). In such cases, the action was amenable to an appeal to the Board, but her appeal was dismissed on some procedural ground. In *Kloeckner*, accordingly, the Court said that "[n]o one here contests that Kloeckner brought a mixed case—that she was affected by an action (*i.e.*, removal) appealable to the MSPB and that she alleged discrimination." 133 S. Ct. at 604. The Board dismissed her appeal, not because the case was unappealable, but because the appeal was untimely. *Id.*

Perry argues that *Kloeckner* eviscerates any effort to distinguish between jurisdictional and procedural

dismissals on the theory that only the latter involves "an action which the employee ... may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). According to Perry, even if *Kloeckner* described mixed cases as ones "appealable to the MSPB," that language is no less applicable to appeals dismissed on procedural grounds than to appeals dismissed on jurisdictional grounds. In either case, Perry contends, the case was not "appealable to the MSPB." *See Kloeckner*, 133 S. Ct. at 604. The Federal Circuit found that argument unpersuasive. *See Conforto*, 713 F.3d at 1118 n.1. We, too, conclude that the argument does not compel finding *Kloeckner*'s result for procedural dismissals incompatible with *Powell's* result for jurisdictional dismissals.

First, jurisdictionally barred appeals differ from procedurally barred appeals because the former were never "appealable to the MSPB." *Kloeckner*, 133 S. Ct. at 604. In the latter situation, by contrast, the employee can be seen to have "been affected by an action which [she] may appeal to the" MSPB. 5 U.S.C. § 7702(a)(1)(A). That statutory language draws attention to the contested "action," and in the case of a procedural dismissal, the *action* affecting the employee is one she can appeal to the Board. It may turn out that she brings her appeal in a procedurally deficient fashion—such as by bringing it too late—but the action itself was appealable. That is not the case with a jurisdictional dismissal.

In addition, with procedurally defective appeals, unlike jurisdictionally barred appeals, the Board can excuse the procedural error and permit the appeal to go forward. As the Federal Circuit explained, the "Board has the authority to entertain appeals that are

procedurally defective under its own regulations, but it may not hear a case over which it lacks jurisdiction." *Conforto*, 713 F.3d at 1118 n.1 (citation omitted). The applicable regulations give the Board discretion to "revoke, amend, or waive" any regulatory requirement "unless a statute requires application of the regulation." 5 C.F.R. § 1201.12; *see also* 5 C.F.R. § 1201.22(c) (enabling Board to excuse untimeliness if "a good reason for the delay is shown").

For those reasons, procedural dismissals can be understood to involve an employee "affected by an action which [she] may appeal to the Board," in a way that jurisdictional dismissals cannot. 5 U.S.C. § 7702(a)(1)(A). That suffices to show that *Kloeckner* did not necessarily overrule or eviscerate *Powell*.

Finally, Perry raises a series of arguments that equally could have been made at the time we decided *Powell*. For instance, he contends that the statute contains a number of deadlines whose effective operation would require knowing whether a case qualifies as a mixed case in advance of the Board's ultimate decision about its jurisdiction. *See, e.g., id.* § 7702(a)(2), (e)(1)(B), (e)(2). As a result, he submits, the forum for judicial review cannot vary based on the Board's eventual decision about its jurisdiction. Such a result, Perry further contends, would give rise to unwarranted uncertainty about the proper forum for judicial review. Whatever else may be true about those arguments, we have no occasion to consider them for the following reason: they gain no additional traction from the Supreme Court's decision in *Kloeckner*, and we therefore have no authority to rely on them as a basis for reconsidering our precedent in *Powell*.

The same is true of Perry's argument that it would make sense for judicial review to reside in federal district courts because jurisdictional dismissals grounded in the voluntariness of the challenged employment action (as in this case) can overlap with the merits of a discrimination claim. That contention not only could have been made in *Powell*, but we in fact specifically considered (and rejected) it. *See* 158 F.3d at 599-600. *Kloeckner* affords us no license to revisit that conclusion. Rather, we are bound to adhere to *Powell's* direction that, when the Board dismisses an appeal for lack of jurisdiction, "the boundaries of the Board's [own] jurisdiction should be subject to uniform interpretation in a single forum—the Federal Circuit." *Id.* at 600.

In short, we remain bound by *Powell*. And in accordance with our precedent in that case, we transfer this petition for review to the Federal Circuit.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1155
September Term, 2014

MSPB-DC-0752-12-0486-B-1
MSPB-DC-0752-12-0487-B-1

Filed On: December 18, 2014

Anthony W. Perry,
Petitioner

v.

Merit Systems Protection Board,
Respondent

BEFORE: Henderson*, Srinivasan, and Millett, Circuit Judges

ORDER

Upon consideration of the court's order to show cause filed August 21, 2014; petitioner's response and supplemental response thereto, which include motions for relief from judgment; respondent's reply and response, which requests the case be transferred to the United States Court of Appeals for the Federal Circuit; and petitioner's reply, it is

ORDERED that the order to show cause be discharged. It is

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* Judge Henderson would grant the respondent's request to transfer the case to the Federal Circuit.

FURTHER ORDERED that the parties, while not otherwise limited, address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. § 7703(b)(1)(B); and (2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2). It is

FURTHER ORDERED that

Rebecca Taibleson
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, DC 20005

a member of the bar of this court, be appointed as amicus curiae to present arguments in favor of petitioner's position. It is

FURTHER ORDERED that petitioner's motions for relief be referred to the merits panel to which this petition is assigned. The parties are directed to address in their briefs any relevant issues presented in the motions rather than incorporate those arguments by reference.

The Clerk is instructed to enter a briefing schedule and calendar this case for presentation to a merits panel.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1155
September Term, 2013

MSPB-DC-0752-12-0486-B-1
MSPB-DC-0752-12-0487-B-1

Filed On: August 21, 2014

Anthony W. Perry,
Petitioner

v.

Merit Systems Protection Board,
Respondent

ORDER

Upon consideration of the petition for review and because the docketing fee has not been paid, it is, on the court's own motion.

ORDERED that, by September 22, 2014, petitioner either pay the $500 docketing fee to the Clerk, U.S. Court of Appeals for the District of Columbia Circuit, or file with this court a motion for leave to proceed in forma pauperis. *See* Attachments. It is

FURTHER ORDERED that, by September 22, 2014, petitioner show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295(a)(9) (Federal Circuit has exclusive jurisdiction over appeal from final order or decision of Merit System Protection Board). The

response may not exceed 20 pages. Failure of petitioner to comply with this order will result in dismissal of this case for lack of prosecution. *See* D.C. Cir. Rule 38.

The Clerk is directed to send a copy of this order to petitioner by certified mail, return receipt requested and by first class mail.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Numbers: DC-0752-12-0486-B-1, DC-0752-12-0487-B-1

DATE: August 6, 2014

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Anthony W. Perry. Upper Marlboro, Maryland, pro se.
Tyree P. Ayers. Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

¶ 1 The appellant has filed a petition for review of the initial decision, which dismissed for lack of jurisdiction his suspension and involuntary retirement appeals because of a settlement agreement entered into before the U.S. Equal Employment Opportunity

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

Commission (EEOC). Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

¶ 2 In August 2011, the appellant and the agency entered into a settlement agreement before the EEOC wherein the appellant agreed, inter alia, to voluntarily resign or retire no later than September 4, 2012, to serve a 30-day suspension which the agency would issue in lieu of effectuating a removal action it proposed in June 2011, and to waive his Board appeal rights with respect to the aforementioned actions. MSPB Docket No. DC-0752-12-0486-I-1 (0486-1), Initial Appeal File (IAF), Tab 14, Subtab 1 at 15-20. After he served the 30-day suspension and retired pursuant to the settlement agreement, the appellant filed an appeal with the Board regarding the 30-day

suspension and his retirement, which he alleged was involuntary. 0486-1, IAF, Tab 1 at 6, ¶ 20; MSPB Docket No. DC-0752-12-0487-I-1 (0487-1), IAF, Tab 1 at 5, ¶ 20.

¶ 3 The administrative judge docketed the suspension and involuntary retirement claims as two separate appeals and later dismissed both appeals without a hearing,[2] finding that the Board lacked jurisdiction because the appellant validly waived his Board appeal rights in the August 2011 settlement agreement. 0486-I, Initial Decision (July 30, 2012); 0487-I, Initial Decision (July 30, 2012).

¶ 4 The appellant then filed petitions for review of the aforementioned initial decisions. 0486-I, PFR File, Tab 1; 0487-I, PFR File, Tab 1. The Board joined the two appeals and granted the appellant's petitions for review. 0486-I, Remand Order (June 12, 2013). The Board found that the appellant's claim, that the agency coerced him into signing the settlement agreement by misinforming him that he would not have Board appeal rights if it effectuated his removal, constituted a nonfrivolous allegation of involuntariness entitling him to a jurisdictional hearing. Remand Order at 6-7. Thus, the Board remanded the appeals for a jurisdictional hearing, so that the appellant would have an opportunity to explain, and present evidence in support of, that nonfrivolous allegation. Remand Order at 9. The appellant raised several other claims of coercion—i.e., that the agency coerced him into

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[2] The administrative judge concluded that the appellant waived his right to a hearing, in part because of conflicting statements the appellant made, but we ultimately concluded that the appellant did not waive his right to a hearing. *See* 0486-I, Remand Order (June 12, 2013).

signing the settlement agreement by threatening to remove him, by proposing adverse action that was discriminatory and that it knew it could not sustain, and by failing to inform him of his Board appeal rights—all of which the Board considered and rejected. Remand Order.

¶ 5 On remand, the administrative judge conducted a hearing, at which the appellant declined to testify. MSPB Docket Nos. DC-0752-12-0486-B-1 and DC-0752-12-0487-B-1 (0486-B), Remand File (RF), Tab 26, Hearing Compact Disc (HCD), Track 4; *see* 0486-B, RF, Tab 28, Remand Initial Decision (RID). The administrative judge thereafter issued an initial decision, again dismissing the appeals for lack of jurisdiction based on the August 2011 settlement agreement. The appellant then filed the instant petition for review, again arguing that he did not voluntarily enter into the settlement agreement. 0486-B, Remand Petition for Review (RPFR) File, Tab 12.

¶ 6 As an initial matter, the appellant seeks to invalidate the settlement agreement by arguing that: (1) the settlement agreement is invalid because it contains a nondisclosure provision, purportedly restricts his ability to communicate with Congress and the Office of Special counsel, and required him to waive his "non-waivable" rights under Title VII; (2) he did not receive any consideration under the settlement agreement for waiving his rights under Title VII; (3) he signed the settlement agreement under duress because the agency presented him with the agreement immediately after proposing his removal; (4) the agency coerced him into signing the settlement agreement by proposing an action which it knew it could not sustain; and (5) the deciding official

intentionally withheld her decision on the proposed removal, which mitigated the proposed removal to a 30-day suspension, in order to coerce the appellant into signing the settlement agreement. *Id.* We will not consider these arguments because they all exceed the scope of the Board's remand order, some have already been raised before the Board and rejected, and some are being raised for the first time.[3] *See Zelenka v. Office of Personnel Management*, 110 M.S.P.R. 205, ¶ 15 n.3 (2008) (refusing to address an appellant's arguments which exceeded the scope of the issues to be addressed on remand), *rev'd on other grounds*, No. 2009-3065 (Fed. Cir. 2010); *see also Sanchez v. Department of Justice*, 14 M.S.P.R. 79, 82 (1982) (the presiding official properly limited the scope of the hearing to those issues discussed in remand order, where the appellant was granted a fair opportunity on his initial appeal to present the issues he attempted to litigate at the remand hearing); *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980) (the Board will not consider an argument raised for the first time

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[3] On July 23, 2014, the appellant filed a request to submit evidence which he contends is new and material. 0486-B, RPFR File, Tab 17 at 3. Specifically, he seeks to submit a letter by the U.S. House of Representative's Committee on Science, Space, and Technology, as well as a report of investigation regarding the agency's Inspector General's alleged failure to remove two employees who coerced other employees into signing a nondisclosure agreement. *Id.* He also states that the Inspector General is, as a result, under investigation for retaliation and questionable hiring practices. *Id.* The appellant's request is DENIED. As previously stated, the appellant's claims regarding the validity of the settlement agreement are outside the scope of our remand order. Further, as explained in more detail below, the merits of his appeal are not before us because we do not have jurisdiction in this matter.

in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence).

¶ 7 On remand, the appellant again alleged that the agency misled him by stating that he would have no right of appeal if the agency removed him. 0486-B, RF, Tab 20 at 18. However, he presented no evidence regarding this issue, which was the sole issue to be addressed on remand, and does not raise any such argument on review. The evidence in the record contradicts the appellant's claim that the agency misled him with respect to his potential appeal rights. The agency attorney who assisted in negotiating and drafting the settlement agreement,[4] a management official who represented the agency during negotiations, and the appellant's union representative who assisted the appellant during negotiations, all testified that: (1) they did not advise the appellant that he would not have appeal rights if he failed to sign the settlement agreement and the agency removed him; and (2) they were not aware of anyone at the agency who so informed the appellant. HCD, Track 3. The appellant's union representative testified that he informed the appellant that he (the appellant) could

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[4] The administrative judge noted in the initial decision that, according to the agency's attorney, the parties continued discussing settlement even after they reached an impasse before an EEOC settlement judge in or around April 2011. RID at 8; *see* 0486-I, IAF, Tab 5. The appellant argues that no additional communication occurred until after the agency provided him with the proposed settlement agreement. 0486-B, RPFR File, Tab 12 at 5, 13. Assuming arguendo that the administrative judge misstated these facts, such an error would be irrelevant to the question of whether the agency provided the appellant with misinformation regarding his potential appeal rights.

choose not to sign the terms of the settlement agreement, "take[] the punishment" the agency selected, and then file a union grievance or an appeal with the Board. *Id.* Further, the union representative testified that he believed the appellant "knew exactly what he was signing." *Id.* We also note that, according to the union representative, he and the appellant jointly devised retirement as a possible settlement term, and this term was later proposed to the agency.[5] *Id.* The union representative's testimony is consistent with contemporaneous notes of the deciding official regarding a conversation she had with the appellant after the agency proposed his removal, wherein he stated that he was "willing to make any concession to remain employed until September 2012," when he would be "eligible to retire at 30 years." 0486-B, RF, Tab 21 at 12.

¶ 8 The administrative judge found the aforementioned witnesses' testimony credible, noting that: (1) all of the witnesses corroborated each other's testimony on every major point and their testimony was consistent in all material respects with the documentary evidence of record; (2) the witnesses' testimony at the hearing was straightforward, genuine and believable, and their demeanor gave no indication of dissembling; and (3) the appellant offered no plausible reason why these witnesses would fabricate

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[5] The appellant claims that he was unaware that the agency proposed settlement terms to his representative, that his representative did not provide him with any assistance, and that his representative did not propose any alternatives and informed him that he would be removed if he did not sign the settlement agreement. 0486-B, RPFR File, Tab 12 at 6. None of these arguments are relevant to the limted jurisdictional issue in this appeal.

their testimony. RID at 13. We must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing, and may overturn such determinations only when there are "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). We discern no basis to disturb the administrative judge's credibility determinations in this case. Based on the foregoing, we find that the appellant has failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because the appellant validly waived his appeal rights therein.

¶ 9 The appellant alleges that the administrative judge committed several errors in adjudicating his appeal on remand, including: (1) failing to consider whether the agency proved its charges; (2) denying him discovery of documents from the deciding official regarding the proposed removal and her decision to sustain the charges, as well as other documents relating to "current & past misconduct" and "other causes for action against" him, and information regarding other employees' time and attendance; (3) denying his request for two witnesses—his first- and second-line supervisors—to testify regarding his time and attendance; and (4) exhibiting bias in favor of the agency and abusing his discretion by not sanctioning the agency for its failure to comply with the acknowledgement order and considering the agency's request to remove medical documentation from the record. 0486-B, RPFR File, Tab 12 at 5, 7-9.

¶ 10 The merits of the agency's charges are not at issue in this appeal because the appellant has not established the Board's jurisdiction over it. *See Evans v. Department of Veterans Affairs*, 119 M.S.P.R. 257, ¶ 5 (2013) (the Board must first resolve the threshold issue of jurisdiction before proceeding to the merits of an appeal). We therefore find that the administrative judge acted properly in not reaching, and in denying the appellant's discovery requests which all relate to, the merits of the agency's charges.[6] Regarding the appellant's request to call his first- and second-line supervisors as witnesses, we note that the administrative judge did not deny this request, but rather, the appellant withdrew it. 0486-B, RF, Tab 22 at 5, Tab 25 at 2; *see* HCD, Track 1 (the appellant did not object to the prehearing conference summary, insofar as it stated that he withdrew his request for his first- and second-line supervisors to testify). In any event, testimony regarding the appellant's time and attendance is irrelevant as it relates to the merits of the agency's charges, so we discern no error or harm.[7]

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[6] We also agree with the administrative judge that the appellant failed to comply with the Board's procedures regarding discovery, and that his discovery requests could therefore have been denied on that basis. *See* 0486-B, RF, Tab 25 at 3. In particular, the appellant submitted his discovery requests directly to the administrative judge, rather than to the agency. *See* 0486-B, RF, Tab 8 at 3-4, Tab 14 at 3; *see also* 5 C.F.R. § 1201.71 (discovery requests and responses thereto are not to be filed in the first instance with the Board).

[7] The appellant attaches evidence which he contends is new and was previously unavailable because he received it via a Freedom of Information Act request. 0486-B, RPFR File, Tab 12 at 6. Specifically, he submits time and attendance records for the time period when he was charged with receiving pay for time not worked in the proposal notice, and Standard Form 50s

As to the appellant's assertion that the administrative judge was biased, he has not overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). The administrative judge stated below that he did not suggest to the agency's representative that he would delete any information from the appellant's pleadings and, moreover, "grant[ed] the appellant's motion to not delete any documents he submitted." 0486-I, IAF, Tab 26 at 3; *see* 0486-I, IAF, Tab 21 (the appellant's opposition to the agency's alleged request to have "all of the medical documents removed from [his] response file"). Further, even if the agency failed to submit documentation relating to the merits of its charges, the appellant has not suffered any harm because such information does not relate to the threshold issue of jurisdiction in this matter, and the administrative judge's decision not to sanction the agency for failing to produce irrelevant evidence does not establish bias.

¶ 11 The appellant raises claims of discrimination on various bases under Title VII. 0486-B, RPFR File, Tab 12 at 4-5, 10, 13. As explained in our remand order, wherein we specifically addressed the appellant's claim that the proposed removal action was motivated by discriminatory animus, the Board may consider Title VII discrimination claims only after a

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documenting his suspension, reassignment, and retirement pursuant to the settlement agreement, as well as various performance awards he has received. *Id.* at 6, 17-46. These documents are not material, as they have no bearing on the Board's jurisdiction over this appeal. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (alleged new evidence must be of sufficient weight to warrant an outcome different from that in the initial decision).

finding of jurisdiction is made. 0486-I, PFR File, Tab 9 at 9-10 n.10; *see Cruz v. Department of the Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) (en banc). To the extent that the appellant is attempting to raise an affirmative defense, we clarify that the Board has no authority to consider affirmative defenses where it cannot hear an appeal on its merits because it lacks jurisdiction to do so. *See Martin v. Department of Defense*, 70 M.S.P.R. 653, 657 (1996). Moreover, contrary to the appellant's contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it. 0486-B, RPFR File, Tab 12 at 4; *see Conforto v. Merit Systems Protection Board*, 713 F.3d 1111, 1118 (Fed. Cir. 2013) (a case is mixed only if the Board has jurisdiction to decide the employee's appeal from the adverse action at issue); *see also Cunningham v. Department of the Army*, 119 M.S.P.R. 147, ¶¶ 8, 13-14 (2013) (providing notice of non-mixed appeal rights because although the appellant alleged that her termination was based on disability discrimination, she did not have the right to appeal her termination to the Board because she failed to make a nonfrivolous allegation of jurisdiction).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD: /s/
William D. Spencer
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

Docket Numbers: DC-0752-12-0486-B-1, DC-0752-12-0487-B-1

DATE: December 23, 2013

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

Anthony W. Perry. Upper Marlboro, Maryland, pro se.
Adam Chandler, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel Madden Turbitt
Administrative Judge

INITIAL DECISION

On April 25, 2012, Anthony W. Perry filed appeals with the Board, challenging his 30-day suspension and alleging that his retirement from the Department of Commerce was involuntary.

Previously, on July 30, 2012, I dismissed both appeals for lack of jurisdiction. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752- 12-0486-I-1 & DC-0752-12-0487-I-1 (Initial Decisions, July 30, 2012). On September 6, 2012, the appellant filed petitions for review of my decisions with the Board. On June 12, 2013, the Board granted the appellant's petitions for review, joined the two appeals, and remanded them to the Washington Regional Office for further adjudication. *Perry v. Department of Commerce*, MSPB

Docket Nos. DC-0752-12-0486-B-1 & DC-0752-12-0487-B-1 (Remand Order, June 12, 2013).

For the reasons set forth below, I find that the appellant failed to prove that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals, which thereby precludes the Board from adjudicating this matter. Therefore, I find that this appeal must be dismissed for lack of jurisdiction.

ANALYSIS AND FINDINGS

Factual Background

The appellant was employed at the agency's Census Bureau as an Information Technology Specialist, GS-2210-14/08. By letter dated June 7, 2011, the Telecommunications Office's Assistant Division Chief, Daren J. Gutschow, informed the appellant of his proposed removal, based on the appellant's alleged receipt of pay for time not worked (62 specifications) and failure to follow supervisory directives (15 specifications). Appeal File (AF), Tab 11; AF, Tab 14, Subtab 1 (at 1-12).[1]

The appellant orally replied to the proposed removal. In addition, on June 30, 2011, he and his designated representative, Johnny T. Zuagar, the President of the American Federation of Government Employees, Local 2782, submitted a written response

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[1] The records in these matters are nearly identical. Thus, unless otherwise noted, all citations herein are to the record in DC-0752-12-0486-I-1 and DC-0752-12-0486-B-1. There are three main parts to the record, one pertaining to the original appeal, cited as "Appeal File," or "AF" another pertaining to the petition for review file, cited as "Petition for Review File," or "PFR File," and the last part is to the record on remand, or "Remand File."

to the proposal letter. AF, Tab 8. The last section of the appellant's written response contains a settlement offer, in which he suggested that he would serve a 14-day suspension in lieu of a removal and would repay the agency "for the portion of hours" the agency deemed warranted for when he was absent but was paid. *Id.* at 4.

On July 25, 2011, Benjamin Felder, the Chief of the Census Bureau's Labor Relations Branch, presented a written settlement counter-offer to Zuagar.

The counter-offer contained the following material terms, in which the agency wanted the appellant to agree to:

- Retire/resign no later than May 30, 2012.
- Not apply for or accept any future positions with the Census Bureau.
- Not engage in any future misconduct.
- Accept a 60-day suspension.
- Accept a reassignment.
- Accept a demotion to a non-supervisory GS-13 position.
- Withdraw all pending complaints/cases against the agency.
- Not file a claim against the agency concerning this matter.

Between August 16, 2011 and August 22, 2011, the appellant, his representative, and several agency officials, executed a settlement agreement resolving several of the appellant's EEO complaints, which was then submitted to the Equal Employment Opportunity Commission (EEOC) Administrative Judge on August

22, 2011. AF, Tab 14, Subtab 1 (at 14-20). The settlement agreement's terms provided, in pertinent part, that in lieu of removal, the appellant would serve a 30-day suspension and voluntarily retire (or, failing that, voluntarily resign) no later than September 4, 2012. *Id.* (at 15-18). The agreement also agreed that, assuming the appellant did not engage in any misconduct from between the times when he settled and until when retired or resigned, his disciplinary record would be expunged. *Id.* (at 18).

More specifically, provision 1 of the agreement states in relevant part that:

> The parties ... voluntarily enter into this Settlement Agreement .... to resolve all existing matters concerning Complainant's[2] employment with the Agency .... By this Agreement, the parties resolve all disputes between them concerning Complainant's employment with the Agency, regardless of the forum, in existence on the effective date of this Agreement.

Under provision 2 of the agreement, the appellant agreed in pertinent part to:

a. Retire voluntarily effective no later than September 4, 2012. Complainant acknowledges that by entering into this Agreement his decision to retire is both voluntary and irrevocable.

b. Voluntarily resign from his employment with the Agency, effective September 4, 2012, in the

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[2] The settlement agreement refers to the appellant as "the Complainant," given that the parties resolved the matter while they were litigating several EEO complaints.

event Complainant has not retired by ... September 4, 2012 ....

c .... [V]oluntarily waive all appeal rights he has and not to litigate in any forum, judicial or administrative, any claims arising from a removal ...

d. Refrain from engaging in any acts of misconduct from the effective date of this Agreement until his retirement or resignation, which will be no later than September 4, 2012 ....

e. Serve a suspension for thirty (30) calendar days in lieu of the removal proposed on June 7, 2011, for receipt for time not worked and failure to follow supervisory directive. The suspension will ... begin[ ] [on] Saturday, August 27, 2011.

f. Accept, at the Agency's sole discretion, a reassignment from the effective date of this Agreement until his retirement or resignation, which will be no later than September 4, 2012 ....

g ....

h. **WAIVER.** Waiver, release, and forever discharge the Agency, its officers, agents, employees, and representatives ... from any claims, demands, or causes of action, which Complainant has or may have, arising from his employment, including issues related [to—a listing of several formal EEO complaints]. Complainant specifically waives any and all rights and claims arising out of the issues raised in the above-cited formal complaints of discrimination and/or [any] related ... action. Complainant waives any and all rights and

> claims arising from Complainant's employment under the Age Discrimination in Employment Act ..., the Rehabilitation Act ..., and/or Title VII of the Civil Rights Act ..., as applicable. This release includes but is not limited to a release of any right to administrative, judicial, or congressional relief, or any other type of relief, or of any claim to back pay, attorneys' fees and costs, or other type of compensation, except what is specifically set forth [elsewhere in the settlement agreement]. However, by entering into this Agreement, Complainant does not waive rights or claims that may arise after the effective date of the Agreement.

Id.

According to provision 8 of the agreement, the appellant stated that he had read and understood "the entire agreement," "especially the provisions relating to the withdrawal of the formal complaint(s), thereby foreclosing further litigation on the matters raised in the formal complaint(s), and the waiver set forth in Paragraph 2." The appellant also agreed that he "signed this Agreement voluntarily and was in no way coerced." *Id.*

On August 26, 2011, consistent with the settlement agreement, the agency issued a decision letter that mitigated the appellant's proposed removal to a 30-day suspension. The agency, in its decision letter, determined that "the reason for the proposed removal [was] fully supported by the evidence" but that a "lesser penalty" of a 30-calendar day suspension would suffice to "deter such misconduct in the future." AF, Tab 12; AF, Tab 14, Subtab 3 (at 1).

On March 29, 2012, the appellant signed and submitted a retirement application, in which he checked the boxes that state he wished to apply for separation under the following conditions: "Voluntary Early Retirement," and "VSIP."[3] The agency approved the appellant's early retirement application on April 2, 2012. AF, Tab 15, Exhibit 4b, at 12.

On April 25, 2012, the appellant appealed to the Board, asserting that he "was coerced to sign the EEOC Settlement Agreement forcing [him] to involuntary [sic] retire ... and [serve] a 30-day suspension." AF, Tab 1 (MSPB Form 185-2, Answer to Question 6). He argued that an agency management official, a Human Resources official, and the agency's attorney made him sign the agreement by threatening that if he did not, he would be removed. *Id.* (MSPB Form 185-4A, Continuation Sheet, Answer to Question 1). He also claimed that the agency discriminated against him on the basis of his race, age, and disability, and that the employment actions were done in reprisal for his prior EEO activity. AF, Tabs 1-2. I docketed the appeal of the alleged involuntary retirement as MSPB Docket No. DC-0752-12-0487-I-1, and the appeal challenging the 30-day suspension penalty as MSPB Docket No. DC-0752-12-0486-I-1.

In response to my Orders regarding Board jurisdiction, the appellant contended that he was "forced to sign [the settlement agreement] under the threat of termination[,] as the agency used misinformation, misrepresentation of the information,

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[3] VSIP stands for "Voluntary Separation Incentive Program," which means the appellant was entitled to receive a cash incentive of $25,000, or a severance pay amount when he retired. AF, Tab 15, Exhibit 4b at 12.

coercion, and the threat of termination to secure [his] signature involuntarily." AF, Tab 14 at 1. He further stated that the agency "committ[ed] a procedural error because [he] was not informed that all suspensions greater than 14-days are appealable as an adverse action and that [he] had appeal rights."[4] *Id.* He also alleged that he was coerced into settling because the agency "knew it could not sustain" the charges brought against him. *Id.*

On July 30, 2012, I issued two initial decisions, dismissing both appeals for lack of jurisdiction. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752-12-0486-I-1 & DC-0752-12-0487-I-1 (Initial Decisions, July 30, 2012). The appellant petitioned for review of my decisions. For the first time on petition for review, the appellant claimed that the agency informed him that he would not be able to appeal his removal to the Board if he refused to sign the EEOC settlement agreement.

The Board granted the appellant's petitions, joined the appeals, and remanded them for further adjudication, including a jurisdictional hearing. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752-12-0486-B-1 & DC-0752-12-0487-B-1 (Remand Order, June 12, 2013).

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[4] To the extent that the appellant is asserting that the agency improperly failed to inform him of a right to appeal the 30-day suspension, the settlement agreement provides that he waived his right to challenge that action (and his retirement). Therefore, I find the agency had no obligation to provide the appellant with appeal rights concerning actions he agreed to serve pursuant to a settlement. *Clark v. U.S. Postal Service*, 989 F.2d 1164 (Fed. Cir. 1993).

The Board, in its Remand Order, held that the appellant made a non-frivolous allegation of involuntariness, inasmuch as the agency supposedly coerced him into settling based on misrepresentations that his only alternative to being removed was to accept the terms of the settlement and that, if he refused to sign the agreement, then he would relinquish his appeal rights. *Id.* at 6-7. Therefore, the Board remanded the appeal for a jurisdictional hearing on these issues.[5]

Testimony at the hearing on remand

A. *Allegation that the agency coerced the appellant into settling.*

The appellant asserted in his pleadings that the agency coerced him into signing the settlement agreement.[6]

At the hearing,[7] Ronda J. Brown testified that she was the attorney representing management during the litigation of the appellant's EEO complaints. She said that she drafted the settlement agreement. She emphasized that the agency did not force the appellant to sign the agreement. She explained that the parties

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[5] The Board also ruled in its Remand Order that the appellant failed to raise a non- frivolous allegation that he was coerced into settling based on his argument that the agency knew it could not substantiate the charges contained in the proposal letter. *Perry v. Department of Commerce*, MSPB Docket Nos. DC-0752-12-0486-I-1 & DC- 0752-12-0487-I-1 (Remand Order, June 12, 2013) at 5-6. As a result of the Board's holding, that issue is not properly before me.

[6] I approved the appellant as a witness, but on the day of the hearing, he chose not to testify.

[7] The compact diskette containing the hearing tapes is located in the record at Remand File, Tab 26.

had extensive settlement discussions during the EEO process. In fact, she remembered that the parties specifically asked for, and received, a Settlement Judge to assist them with settlement negotiations. AF, Tab 5 (April 5, 2011 letter from the appellant to EEOC Administrative Judge Mary E. Palmer, titled "Preparation For Settlement Discussion.") Brown indicated that the parties reached an impasse after meeting for several hours with the Settlement Judge.

Brown testified that the parties continued talking about settlement even after working with the Settlement Judge, however. She noted, for instance, that the agency issued an email to the appellant on May 19, 2012, which set forth various settlement proposals. She recalled that, once the parties came to resolution, the appellant and the union carefully read the entire settlement agreement before they both signed it.

Terryne F. Murphy, Chief, Information Systems Support and Review Office, testified that she was the deciding official in the appellant's proposed removal action. She stated that the agency did not force the appellant into agreeing to settle. She recalled that on June 15, 2011, about a week after the appellant received a copy of the notice of proposed removal, he came to her office and offered a number of options to try and resolve his pending discrimination complaints because he told her "he did not want to be fired." She said she listened to him without responding to his offers because she "did not know what to say to him" at that juncture. Murphy stated that she drafted a memorandum less than one hour after she spoke with the appellant summarizing their conversation. AF, Tab 21, Exhibit 1 at 2. She reviewed the memorandum

and confirmed that it was an accurate reflection of their discussion. She indicated that, according to her notes, the appellant offered to be demoted and said that he was "willing to make any concession to remain employed until September 2012. This will be the time that he is eligible to retire at 30 years." *Id.* She added that, subsequently, the appellant submitted a written reply to the notice of proposed removal, in which he offered several other alternatives to try and informally resolve the matter. *Id.*, Exhibit 2 at 1-6.

Stacey Chalmers, the Chief of the Census Bureau's Employee Relations Branch, testified that she met with Murphy, the deciding official, to assist in the action to remove the appellant. She indicated that the agency did not coerce the appellant into resolving his appeal. She said that he had other options; for instance, he could have chosen to fight the removal action or resign.

Benjamin Felder, a Labor Relations Officer in the Census Bureau's Human Resources Office, denied that the appellant was coerced into settling. Felder testified that he had "extensive" settlement discussions with the appellant and Zuagar, the appellant's union representative. Felder recalled drafting an email to the appellant and his representative, in which he clarified that certain matters were "not negotiable." He recounted that one of the most important of these issues was that, if the appellant did settle, then he must agree to retire or resign no later than May 2012. Felder said that there was "a lot of back and forth" between the parties on approving particular language before the settlement was finalized. He indicated that the appellant always could have chosen not to settle

and instead opted to contest the possible removal and wait for "the disciplinary process to play itself out."

John T. Zuagar testified that he was the appellant's union representative and he participated in settlement talks with management on behalf of the appellant. According to Zuagar, the appellant entered into the settlement agreement of his own volition. Zuagar indicated that the appellant, after consulting with him and other union officials, submitted a written response to the notice of proposed removal and offered settlement options in his written reply. Zuagar disagreed with the appellant's characterization of the parties' settlement discussions as being "non-negotiable," given that the union successfully bargained to get the appellant additional time to remain in a work status until he retired, from May 2012 (the date the agency proposed) until September 2012 (the date the union proposed). He recounted that, when the settlement agreement was being drafted, the appellant and the union closely read and "went over" every section of the agreement until it was "well known" to both parties. Zuagar said it was his understanding that the appellant "knew what he was doing" before he executed the agreement. He stated that the appellant and the union thought that signing the agreement "was the best way to go" under the circumstances. Zuagar noted that the appellant was not coerced because, if he wished, he could have chosen to reject the settlement offer and allow the disciplinary action to "go forward" and challenge it. In fact, Zuagar specifically recalled talking to the appellant about considering settling instead of litigating the removal action and possibly risk losing his case before the Board.

B. *Allegation that the agency forced the appellant to retire as part of the settlement.*

Next, the appellant argued that the agency forced him to retire as part of a settlement. He asserted that language contained in the agreement, which states that his decision to retire would be "voluntary" and "irrevocable," are mutually exclusive terms, demonstrating that he was pushed into retiring against his will.

At the hearing, Brown, Murphy, Felder, and Chalmers all testified that under paragraph 2a of the settlement agreement, it clearly states that the appellant's retirement would be both "voluntary" and "irrevocable." They disagreed with the appellant's argument that a retirement cannot be both "voluntary" and "irrevocable" at the same time. They explained that, by signing the agreement, the appellant willingly agreed to retire and also agreed to not revoke his retirement before it became effective. They noted that, generally speaking, an individual may still revoke his or her retirement, even after submitting a retirement application with the Office of Personnel Management (OPM), so long as the revocation is made prior to the effective date of the retirement. Here, the appellant completed Part E of the Standard Form 52 attached to the settlement agreement, which the agency used to process his retirement. The appellant also submitted his retirement application to OPM.

Zuagar explained that it was the union, and not management, that recommended having the appellant retire pursuant to a settlement and so it was not something management forced upon the appellant, as he claimed. Zuagar testified that he believed the terms "voluntary" and "irrevocable" were not mutually

exclusive and stated that the appellant's retirement could be both without it being coerced.

C. *Allegation that the agency made misrepresentations to the appellant to induce him to settle.*

The appellant, moreover, contended that the agency made misrepresentations to him upon which he detrimentally relied in agreeing to settle.

At the hearing, Brown, Murphy, Chalmers, and Felder testified that the agency did not make any misrepresentations to the appellant in order to induce him to settle. They added that the waiver provision (provision 2h) of the agreement plainly states that the appellant would waive his appeal rights if he settled. They stated that the agreement did not misrepresent the appellant's appeal rights and did not violate Title VII of the 1964 Civil Rights Act, because the last sentence of paragraph 2h clearly states that he would not be waiving any *future* appeal rights, as he alleged. They testified that, to the best of their knowledge, no one ever told the appellant that he would lose his right to appeal his removal to the Board, should he fail to sign the agreement.

Brian E. McGrath, the Associate Director for Information Technology, testified that he never made any misrepresentations to the appellant to induce him to settle and he was unaware that any misrepresentations occurred. He said, in fact, that he never spoke to the appellant or his representative during the negotiations leading up to the settlement agreement. McGrath indicated that he was genuinely surprised that the appellant alleged misrepresentation, given that on September 23, 2011, or approximately one month after the parties settled, the appellant sent

McGrath an email in which he wrote that he "wanted to sincerely thank [McGrath] for allowing [him] to stay on until Sept[ember]. I don't know if this is appropriate ... but [I] wanted you to know I am thankful." AF, Tab 8, Subtab 1 at 21.

Zuagar testified that no one made any misrepresentations to the appellant in order to induce him to settle. Zuagar confirmed that the appellant agreed to waive his right to appeal under the settlement agreement. He pointed out that provision 2h explicitly sets forth that the appellant would waive his right to challenge the removal action. Zuagar disagreed with the appellant's assertion that the waiver provision in the settlement was illegal because he had to waive future appeal rights. He pointed out that, under the agreement, the appellant agreed to waive all present claims, but not any possible future EEO discrimination complaints, as is clearly spelled out in the agreement. Zuagar indicated that, during settlement negotiations, he and the appellant discussed that this would be a "global settlement," meaning that the appellant would agree "to resolve all outstanding issues at one time." Zuagar said he also explained to the appellant during their talks what his rights were and which rights he would relinquish under the agreement. Zuagar described the appellant as "smart" and so the appellant definitely understood what he was doing. Zuagar stated that he never heard anyone tell the appellant that he would lose his appeal rights if he refused to sign the settlement agreement.

The appellant voluntarily entered into the settlement agreement without fraud, coercion, and/or misrepresentation.

A party challenging the validity of a settlement agreement bears a heavy burden of showing a basis for invalidating it. *Bynum v. Department of Veterans Affairs*, 77 M.S.P.R. 662, 665 (1998). I find that the appellant here failed to meet this heavy burden and he did not establish that the settlement agreement is invalid due to fraud, coercion, or misrepresentation.

Based on my review of the documentary and testimonial evidence, I find that there is sufficient evidence to show that the parties entered into a valid, enforceable settlement agreement. I conclude that, according to the testimony provided and the relevant terms of the settlement agreement, the appellant's removal was mitigated to a 30-day suspension and later, a voluntary retirement. The agreement specifically notes that the appellant read and understood the terms of the settlement, that he entered into it willingly and knowingly, and that he agreed to waive his right to challenge the possible removal action.

The assertions made by the appellant, who argued that the settlement agreement was coerced, differed in material respects from the testimony of every witness at the hearing, including that of his own union representative. I find these witnesses credibly testified that the agreement was freely reached by the parties, that no fraud, coercion or misrepresentation occurred, and that the appellant understood the terms and conditions of the settlement, including the waiver provision and that he freely agreed to a reduced penalty and retirement pursuant to the agreement.

See Hillen v. Department of the Army, 35 M.S.P.R. 453, 458 (1987) (opportunity and capacity to observe the event or act in question, lack of bias, contradiction of the witness' version of events by other evidence or its consistency with other evidence, inherent improbability, and demeanor). I also find the testimony of these witnesses to be more credible than the sworn and unsworn statements the appellant filed in his pleadings. All of the witnesses corroborated each other's testimony on every major point and their testimony was consistent in all material respects with the documentary evidence of record. In addition, the witnesses' testimony at the hearing was straightforward, genuine, and believable, and their demeanor gave no indication of dissembling. The appellant also offered no plausible reason why these witnesses would fabricate their testimony, other than his bare assertions that they were harassing him.

The appellant's statements, on the other hand, were not corroborated by any other person on the most significant points. I also find that the appellant's assertions of agency impropriety are self-serving and ring hollow. Furthermore, I find it inherently improbable that the appellant did not understand the settlement language or that he was under duress to sign the agreement or retire. The undisputed record shows that the appellant is highly educated, literate, articulate, and he occupied a high-level government position, meaning that he definitely had the capacity to fully comprehend everything he was agreeing to when he settled. I also find no merit to the appellant's contention that a retirement cannot be both "voluntary" and "irrevocable" at the same time. I also see this argument for what it truly is—a feeble attempt on his part to distract us from the plain terms of the

agreement that clearly reflect he willingly agreed to retire, especially in light of the fact that either he or the union originally came up with the idea.

Likewise, the fact that he frequently consulted with his representative prior to signing belies his alleged failure to understand the terms of the agreement. He and his representative also met with management officials to discuss their concerns about the agreement and they exchanged emails and letters on the subject. AF, Tab 14, Subtab 1 (at 20), Subtab 3 (at 1), Subtab 8 (at 8-16); Tab 15, Subtab 4a. If the appellant is telling the truth that he did not understand certain provisions of the agreement, and I doubt that he is, then the agency supplied him with ample exchanges to clarify any questions he might have entertained. Similarly, if the appellant really did not comprehend or felt pressured into entering the agreement, then he always had the choice to delay signing it even longer or refusing to sign it altogether. *See Candelaria v. U.S. Postal Service*, 31 M.S.P.R. 412, 413 (1986) (to establish that a settlement was fraudulent as a result of coercion or duress, a party must prove that he involuntarily accepted the other party's terms, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts). The appellant's assertions of fraud, coercion, and confusion also are contradicted by the clear, straightforward language contained in the agreement. As a result, I find the hearing testimony of the witnesses to be far more credible than the appellant's sworn and unsworn statements.

In addition, it is undisputed that the agency provided the appellant with a significant amount of time in which he could contemplate whether or not he

wanted to enter into the agreement. Such a lengthy time to consider a settlement agreement cannot be deemed coercive. *Frizzell v. Department of Air Force*, 53 M.S.P.R. 413 (1992) (employee's allegation that agency did not afford him sufficient time to review settlement did not warrant setting aside that agreement, where record reflected that settlement was the result of negotiations which took place with employee's active participation over a 30-day period).

I find that just because the appellant "was faced with an inherently unpleasant situation or his choice [was] limited to two unpleasant alternatives" did not make his choice involuntary. *Parrott v. Merit Systems Protection Board*, 519 F.3d 1328, 1334-35 (Fed. Cir. 2008) (citing *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984)). Similarly, I find that even though the appellant was presented with a difficult choice when he had to sign the settlement agreement, neither the choice itself nor the circumstances under which it was made were the result of any improper agency actions.

In light of these facts, I find that the appellant failed to meet his burden of proving that the agency engaged in bad faith, fraud, coercion, or misrepresentation before he signed the settlement agreement. *See Miller v. Department of Health and Human Services*, 41 M.S.P.R. 385, 391-92 (1989); *see generally* Restatement of Contracts § 312 (1932). For all of the above reasons, I must conclude that the parties entered into a valid, enforceable agreement. I also must conclude that the appellant voluntarily agreed to serve a 30-day suspension and then retire pursuant to that agreement, and that he knowingly

agreed to waive his appeal rights as part of that settlement.

The Board lacks jurisdiction over this appeal.

Because the parties entered into a settlement agreement and the appellant chose to settle the matter by agreeing to a lesser discipline and retirement, those courses of action are presumptively voluntary and therefore divest the Board of jurisdiction over the underlying matter. *Swink v. U.S. Postal Service*, 111 M.S.P.R. 620, ¶ 9 (2009). The language of the agreement indicates that the appellant clearly and unequivocally waived his right to file a Board appeal of the removal action. *See Mays v. U.S. Postal Service*, 995 F.2d 1056, 1059 (Fed. Cir. 1993). Similarly, nothing in the settlement agreement expressly preserved the appellant's right to appeal the removal action to the Board.[8] *Perry v. U.S. Postal Service*, 78 M.S.P.R. 272, 276-77 (1997). Consequently, I conclude that the Board lacks jurisdiction over this appeal and it must be dismissed.

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[8] I deny the appellant's July 15, 2013 "motion to provide the title and reason for every returned document in the Petition for Review File ... and the Initial Appeal File." First, no pleadings were returned in the initial appeal file. Second, the Clerk of the Board provided the appellant with explicit reasons for why the Board rejected his pleadings on petition for review, *see* Petition for Review File, Tab 8, and so I need not reiterate those reasons here. Also, although I did not explicitly state this in my August 6, 2013 Order and Summary of PrehearingConference, another reason I denied the appellant's motion to compel and "motion for discovery" on remand is because he sought information on personnel matters that occurred years before his proposed removal and that had nothing to do with the delineated narrow issue defined by the Board in these proceedings.

Finally, to the extent that the appellant raises claims of reprisal for EEO activity and discrimination based on his age, race, and disability, the Board lacks jurisdiction absent an otherwise appealable action. Allegations of prohibited personnel practices under 5 U.S.C. § 2302(b) are not an independent source of Board jurisdiction. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

DECISION

The appeal is DISMISSED.[9]

FOR THE BOARD: /s/
Daniel Madden Turbitt
Administrative Judge

[9] Because the case is dismissed for lack of jurisdiction, I need not address the appellant's allegations that the agency: did not properly consider the *Douglas* factors in assessing the penalty of removal, or allegedly denied him due process when it proposed his removal. Also, given my jurisdictional determination, the appellant's November 26, 2013 "Request for an Immediate Decision on the Merits" is denied.

NOTICE TO APPELLANT

This initial decision will become final on **January 27, 2014,** unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading

and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the *earlier* date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the

petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(l).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and *Forms* 5, 6, and 11.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Numbers: DC-0752-12-0486-I-1, DC-0752-12-0487-I-1[1]

DATE: June 12, 2013

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

THIS ORDER IS NONPRECEDENTIAL[2]

Anthony W. Perry. Upper Marlboro, Maryland, pro se.
Adam Chandler, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

REMAND ORDER

The appellant has filed petitions for review in these cases asking us to reconsider the initial decisions

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[1] The records in these matters are virtually identical. Thus, unless we expressly indicate otherwise, all citations herein are to the record in DC-0752-12-0486-I-1.

[2] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

issued by the administrative judge, which dismissed the appellant's appeals for lack of jurisdiction due to a settlement agreement entered into before the U.S. Equal Employment Opportunity Commission (EEOC). For the reasons discussed below, we GRANT the appellant's petitions for review, JOIN the two appeals, and REMAND these cases to the Washington Regional Office for further adjudication in accordance with this Order.[3]

BACKGROUND

On June 7, 2011, the agency proposed the appellant's removal from his GS-14 Information Technology Specialist position for "Receipt of Pay for Time not Worked" and "Failure to Follow Supervisory Directive." Initial Appeal File, MSPB Docket No. DC-0752-12-0486-I-1 (IAF-0486), Tab 14, Subtab 1 at 1-12. Between August 16, 2011 and August 22, 2011, the appellant, his representative, and several agency officials, executed a settlement agreement resolving several of the appellant's EEO complaints, which was then submitted to the EEOC administrative judge on August 22, 2011.[4] *Id.* at 14-20.

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[3] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[4] The appellant incorrectly contends that "the Administrative Judge makes a misstatement of fact in stating that the ... EEO Settlement Agreement was reached before the EEOC." Petition for Review File, MSPB Docket No. DC-0752-12-0486-I-1 (PFR File-0486), Tab 1 at 4. The settlement agreement bore an EEOC caption and, once fully executed, was submitted to the EEOC administrative judge. IAF-0486, Tab 14, Subtab 1 at 14-15.

The settlement agreement stated that the parties entered into it "voluntarily" to "resolve all disputes between them concerning [the appellant's] employment with the Agency, regardless of the forum, in existence on the effective date of th[e] Agreement." *Id.* at 15. As part of the agreement, the parties agreed that the appellant would "[s]erve a suspension for thirty (30) calendar days in lieu of the removal proposed on June 7, 2011."[5] *Id.* at 16. Further, the appellant agreed to "[r]etire voluntarily effective no later than September 4, 2012." *Id.* at 15.

Consistent with the settlement agreement, on August 26, 2011, the agency issued a decision on the proposed removal, finding that "the reason for the proposed removal [wa]s fully supported by the evidence" but that a "lesser penalty" of a 30 calendar day suspension would be sufficient to "deter such misconduct in the future." *Id.*, Subtab 3 at 1-2. Then, on March 29, 2012, the appellant submitted an application for "voluntary early retirement," which the agency approved on April 2, 2012. IAF-0486, Tab 15 at 12.

On April 25, 2012, the appellant filed an appeal with the Board, challenging his alleged involuntary retirement and suspension for more than 14 days. IAF-0486, Tab 1 at 6, ¶ 20; Initial Appeal File, MSPB

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[5] We disagree with the appellant's claim that the agency "did not provide any document to [him] stating that the 30-day suspension was a mitigation of any adverse action [it] took or threatened to take against [him]." PFR File-0486, Tab 1 at 3. The EEO settlement agreement plainly stated that "[i]n consideration," the agency would not remove the appellant based upon the charges outlined in the proposal to remove and would issue a decision on the proposal to remove, suspending the appellant for 30 days. IAF-0486, Tab 14, Subtab 1 at 17.

Docket No. DC- 0752-12-0487-I-1 (IAF-0487), Tab 1 at 5, ¶ 20. The administrative judge then docketed the involuntary retirement appeal as MSPB Docket No. DC-0752-12-0487-I-1 and the adverse action (30-day suspension) appeal as MSPB Docket No. DC-0752-12-0486-I-1. *See* IAF-0486, Tab 28 at 1 n.*; *see also* IAF-0487, Tab 28 at 1 n.*. In response to the administrative judge's Orders regarding Board jurisdiction, the appellant filed identical submissions in each appeal, contending that he was "forced to sign [the settlement agreement] under the threat of termination [,] as the agency used misinformation, misrepresentation of the information, coercion, and the threat of termination to secure [his] signature involuntarily." IAF-0486, Tab 14 at 1; IAF-0487, Tab 14 at 1. He further stated that the agency "committ[ed] a procedural error because [he] was not informed that all suspensions greater than 14-days are appealable as an adverse action and that [he] had appeal rights." IAF-0486, Tab 14 at 1; IAF-0487, Tab 14 at 1. He also alleged that he was coerced because the agency "knew it could not sustain" the charges brought against him. IAF-0486, Tab 14 at 2; IAF-0487, Tab 14 at 2.

The administrative judge subsequently issued his initial decisions dismissing the appeals for lack of jurisdiction, without holding a hearing, finding that the appellant had validly waived his appeal rights via the EEOC settlement agreement. IAF-0486, Tab 28, Initial Decision (ID); IAF-0487, Tab 28. Thus, he found that the appellant could not appeal his 30-day suspension, and that the appellant's retirement was not involuntary, because he voluntarily agreed to these actions pursuant to the settlement agreement. IAF-

0486, Tab 28, Initial Decision (ID) at 4-5; IAF-0487, Tab 28 at 4-5.

In his petition for review, the appellant argues that he was entitled to an evidentiary hearing on the issue of jurisdiction because he made a non-frivolous allegation of involuntariness.[6] PFR File-0486, Tab 1 at 5. He cites to *Schultz v. United States Navy*, 810 F.2d 1133 (Fed. Cir. 1987), claiming that the agency "knew it could not substantiate or sustain" the charges against him. *Id.* at 2-4, 11-12. Further, he alleges that he entered into the settlement agreement because the agency provided him with "misinformation with regard to [his] due process rights and MSPB appeal rights" and "stat[ed] that there were no appeal rights." *Id.* at 5-6.

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[6] The appellant alleges that the administrative judge abused his discretion and exhibited bias in favor of the agency. PFR File-0486, Tab 1 at 7-10. An administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). We see no such evidence in the record.

The appellant also seems to suggest that he was coerced into signing the settlement agreement because his alternative was removal. *See* PFR File-0486, Tab 1 at 6, 10. To the extent the appellant is making this argument, it must fail. An appellant's choice between unpleasant alternatives, including the threat of removal, is insufficient to set forth a nonfrivolous allegation of involuntariness. *Lee v. Office of Personnel Management*, 23 M.S.P.R. 403, 406 (1984).

ANALYSIS

The appellant's claim that the agency knew it could not substantiate his proposed removal does not constitute a nonfrivolous allegation of coercion.

Regarding the appellant's claim that the agency knew its actions against him could not be sustained, the Board has held that an appellant may show coercion by demonstrating that the agency believed its proposed adverse action could not be substantiated, or that there was no arguable basis for the proposed action. *Bahrke v. U.S. Postal Service*, 98 M.S.P.R. 513, ¶12 (2005); *see Schultz*, 810 F.2d at 1136 (a threatened action is "purely coercive" if "the agency knew that the reason for the threatened [action] could not be substantiated").

There is no evidence that such circumstances are present here. Charge 1 of the proposed removal related to the appellant's alleged receipt of pay for time not worked on several dates between October 2010 and May 2011. IAF-0486, Tab 14, Subtab 1 at 1-10. In his written reply, the appellant admitted to his ongoing absences from the workplace, though he attempted to explain them, noting that he took "extended lunch periods;" took breaks to walk, stretch, or "reclin[e] in [his] car" due to his medical condition; and, spent time in his car working on his EEO cases. *Id.*, Subtab 2 at 2. Further, he conceded that several of the specifications noted in Charge 1 were attributable to "failed communications between [him] and [his] supervisor," including the appellant forgetting to complete leave requests and/or "correct time and attendance for leave taken." *Id.* at 2-3. Charge 2 concerned the appellant's alleged failure, on several dates between April 2011 and May 2011, to follow his

supervisor's directive to sign in and out on the attendance log. *Id.*, Subtab 1 at 10-11. The appellant's written reply indicated that, despite being aware of this directive, the appellant did not begin signing in and out until his supervisor responded to his requests for an explanation "regarding th[is] change in procedure," sometime after he received the June 7, 2011 proposed removal notice. *Id.*, Subtab 2 at 3. Based on the appellant's own statements, there appears to have been at least some basis for the proposed discipline.

The appellant made a non-frivolous allegation of involuntariness.

An appellant may establish that the Board has jurisdiction over an action taken pursuant to the terms of a settlement agreement wherein he agreed to waive his appeal rights if he can establish that the agreement was invalid due to misrepresentation by the agency.[7] *Simmons v. Small Business Administration*, 115 M.S.P.R. 647, ¶ 11 (2011). A showing that a reasonable person would have been misled by the agency's statements is sufficient to show misrepresentation. *Hazelton v. Department of Veterans Affairs*, 112 M.S.P.R. 357, ¶ 11 (2009).

The appellant alleged that he was coerced into signing the settlement agreement under "threat of

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[7] We discern no basis in this matter to distinguish between settlement agreements entered into before the Board and agreements entered into in other forums. *Swink v. U.S. Postal Service*, 111 M.S.P.R. 620, ¶ 9 (2009), *aff'd*, 372 F. App'x 90 (Fed. Cir. 2010) ("[T]he Board will review the terms of a settlement agreement and the surrounding circumstances to determine if it retains jurisdiction over an appeal of an action that was settled in another procedural avenue.").

termination at the Agency's sole discretion." IAF-0486, Tab 14 at 1. He further alleged that the agency provided him with "misinformation," "misrepresented]" information, and did not inform him "that [he] had appeal rights."[8] *Id.* The appellant's allegations can be fairly interpreted to mean that the agency advised him that his only alternative to termination was to accept the terms of the settlement agreement and indicated that he would not otherwise have appeal rights. Indeed, on review, the appellant reiterates that the agency provided him with "misinformation with regard to [his] due process rights and MSPB appeal rights" and "stat[ed] that there were no appeal rights." PFR File-0486, Tab 1 at 5-6; *see* IAF-0486, Tab 14 at 1. We therefore find that the appellant made a nonfrivolous allegation of involuntariness sufficient to warrant a jurisdictional hearing. If the appellant is able to prove his allegation that the agency provided him with misinformation upon which he detrimentally relied in signing the settlement agreement (namely, that he would not otherwise have appeal rights), this would demonstrate that he did not enter into the agreement voluntarily. *See Gutierrez v. U.S. Postal Service*, 90 M.S.P.R. 604, ¶ 9 (2002) (finding that the appellant's allegation that the agency incorrectly "told him that, if he did not resign and the agency followed through with

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[8] To the extent the appellant alleges that the agency was required to notify him of his appeal rights before he signed the settlement agreement, this is incorrect. An agency is not obligated to notify an employee of his Board appeal rights until it "issues a decision notice ... on a matter that is appealable to the Board." 5 C.F.R. § 1201.21; *Gingrich v. U.S. Postal Service*, 61 M.S.P.R. 583, 587 (1995) (stating that an agency is obligated to notify an employee of his Board appeal rights when it takes an appealable action).

its proposal to remove him, he would not have appeal rights with regard to the removal action" constituted a "nonfrivolous allegation that his resignation was involuntary").

We remand these cases for a jurisdictional hearing.

As stated previously, the administrative judge dismissed the appellant's appeals for lack of jurisdiction without holding a hearing. ID. However, where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over an appeal, he is entitled to a jurisdictional hearing. *Ferdon v. U.S. Postal Service,* 60 M.S.P.R. 325, 329 (1994). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Id.* While an appellant may waive his right to a hearing, the waiver must be clear, unequivocal, informed, and decisive. *Oneisom v. Department of the Air Force,* 102 M.S.P.R. 386, ¶ 6 n.2 (2006). We have already determined that the appellant's claim of misrepresentation constitutes a nonfrivolous allegation of Board jurisdiction. Further, as discussed below, we find that the appellant did not waive his right to a jurisdictional hearing.

In his initial appeal form, the appellant requested a hearing. IAF-0486, Tab 1 at 3. However, on May 3, 2012, the appellant submitted a letter to the administrative judge waiving his right to a hearing. *Id.,* Tab 4 at 1. On May 7, 2012, the administrative judge issued an Order scheduling a close of record conference, which he believed would be "beneficial," given that "the appellant waived his right to a hearing and stated that he preferred to have a decision based on the written record." *Id.,* Tab 6 at 1. On

June 1, 2012, in a letter providing his contact information for the close of record conference, the appellant stated that he believed he had a right to a jurisdictional hearing although he waived his right to a hearing on the merits and requested that the administrative judge clarify this issue during the close of record conference. *Id.*, Tab 17 at 1.

The administrative judge then held a conference with the parties on June 4, 2012. *Id.*, Tab 26. During the conference, the appellant asked that his hearing request be reinstated only as to the issue of jurisdiction and the administrative judge then clarified the difference between the issues of jurisdiction and the merits. *Id.* at 3. Subsequently, apparently because he understood the administrative judge's explanation to mean that a "hearing on the issue of jurisdiction is one and the same as the hearing on the merits of the case" and that he could not have a "hearing on jurisdiction alone,"[9] the appellant sent a letter to the administrative judge on June 4, 2012, declining a hearing on jurisdiction. *Id.*, Tab 20 at 1, Tab 25 at 1.

On June 18, 2012, in his response to the agency's opposition to various motions he filed, the appellant again stated that he withdrew his request for a hearing based on this understanding, reiterated his prior request for a "hearing on the issue of jurisdiction only,"

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[9] The administrative judge contends that this is "not an accurate reflection of what [he] said." He explained that "although the issues of jurisdiction and the merits are different ... [he] would not bifurcate the hearing on just the question of whether the appellant raised nonfrivolous allegations concerning jurisdiction." IAF-0486, Tab 26 at 3 n.2. Rather, "if [he] deemed it appropriate to go forward with a hearing, [he] would listen to testimonial evidence on all matters (the jurisdictional issues as well as the merits)." *Id.*

and requested that the administrative judge "provide the documentary evidence that precludes the appellant from the right of a hearing on the issue of jurisdiction alone." *Id.*, Tab 25 at 1. On June 26, 2012, the administrative judge issued his summary of the June 4, 2012 conference, granting the appellant's request to waive the hearing. *Id.*, Tab 26 at 3. The administrative judge's summary of the conference afforded the parties the opportunity to make an oral objection, or motion to supplement, by a date certain if they disagreed with the summary. *Id.* at 5. The appellant timely submitted a motion to supplement stating, in relevant part, "other cases make it clear that the issue of jurisdiction are separate issues as you state and that the appellant has the right to a hearing on the matter of jurisdiction alone, which is what I am seeking." *Id.*, Tab 27 at 5.

In sum, we find that the appellant did not waive his right to a hearing. The pleadings and communications in the record reflect that the appellant repeatedly stated that he wished to have a jurisdictional hearing. *See generally* IAF-0486, Tabs 17, 20, 25-27. Further, the appellant timely objected to the administrative judge's summary of the June 4, 2012 conference, again stating that he was seeking a jurisdictional hearing. IAF-0486, Tab 27 at 5. Thus, the administrative judge erred in proceeding to dismiss the appeals on jurisdictional grounds without a hearing. ID.

We remand these cases for a jurisdictional hearing, so that the appellant may have an opportunity to

explain, and present evidence in support of, the above-noted nonfrivolous allegation.[10]

ORDER

For the reasons discussed above, we REMAND this case to the Washington Regional Office for further adjudication in accordance with this Remand Order.

FOR THE BOARD: /s/
William D. Spencer
Clerk of the Board

Washington, D.C.

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[10] The appellant argues that the administrative judge should have considered his argument that the proposed removal action was motivated by discrimination and retaliation under Title VII. PFR File-0486, Tab 1 at 2-3. However, the Board may consider a claim of discrimination under Title VII only after a finding of jurisdiction is made. *Cruz v. Department of the Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) (en banc) ("The Board has not been granted jurisdiction over Title VII claims ... unaccompanied by an appealable action over which the Board does have jurisdiction."); *see Schmittling v. Department of the Army*, 219 F.3d 1332, 1336-37 (Fed. Cir. 2000) (the Board must first address the matter of jurisdiction before proceeding to the merits of the appeal).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

Docket Number: DC-0752-12-0487-I-1*

DATE: July 30, 2012

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

Anthony W. Perry, Upper Marlboro, Maryland, pro se.
Adam Chandler, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel Madden Turbitt
Administrative Judge

INITIAL DECISION

On April 25, 2012, Anthony W. Perry filed an appeal with the Board, challenging his 30-day suspension and alleging that his retirement from the Department of Commerce was involuntary. For the reasons below, this appeal is DISMISSED for lack of jurisdiction.

Background

The appellant was employed at the agency as an Information Technology Specialist, GS-2210-14/08. By letter dated June 7, 2011, Assistant Division Chief

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* This docket number pertains to the appellant's claim of involuntary retirement. His companion appeal, pertaining to his 30-day suspension, is docketed at DC-0752-12-0486-I-1.

Daren J. Gutschow notified the appellant of his proposed removal, based on the appellant's alleged receipt of pay for time not worked and failure to follow supervisory directives that required him to use the workplace attendance log. Appeal File (AF), Tab 14, Subtab 1 (at 1-12). The parties reached settlement of that proposed termination action at the Equal Employment Opportunity Commission (EEOC) and executed a settlement agreement on August 22, 2011. *Id.* (at 14-20). The terms of the settlement agreement provided, in pertinent part, that in lieu of removal, the appellant would serve a 30-day suspension and voluntarily retire (or, failing that, resign) no later than September 4, 2012. *See id.* (at 15-18). Assuming the appellant did not engage in any misconduct between that time and his retirement, the agency agreed that it would also expunge his record. *Id.* (at 18). On August 26, 2011, the agency issued a decision letter that mitigated the appellant's proposed removal to a 30-day suspension. AF, Tab 14, Subtab 3 (at 1).

The appellant filed the instant appeal with the Board on April 25, 2012, averring that he "was coerced to sign the EEOC Settlement Agreement forcing [him] to involuntary [sic] retire ... and [serve] a 30-day suspension." AF, Tab 1 (MSPB Form 185-2, Answer to Question 6). He also claimed that the agency discriminated against him on the basis of his race, age, and disability, and that the employment actions were reprisal for his prior EEO activity. *Id.*

The appellant has failed to prove by preponderant evidence that the Board has jurisdiction over this appeal.

The jurisdiction of the Board is not plenary in nature; rather, it is limited to actions designated as

appealable to the Board under any law, rule or regulation. 5 U.S.C. § 7701(a); *see also Martinez v. Merit Systems Protection Board*, 126 F.3d 1480, 1482 (Fed. Cir. 1997). The Board's jurisdiction is determined at the time the appeal is filed. *Gillespie v. Department of Defense*, 90 M.S.P.R. 327, ¶ 7 (2001); *Castro v. U.S. Postal Service*, 51 M.S.P.R. 530, 532 (1991). The appellant has the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2)(i). Preponderance of the evidence is defined by regulation as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

Based on the record before me, I find that this appeal is not within the Board's jurisdiction. First, to the extent the appellant argues that the agency has breached the settlement agreement, that is an enforcement issue that the appellant must pursue through the EEOC. This Board has authority to enforce the terms of a settlement agreement where the agreement has been accepted into the record of a Board appeal. *See, e.g., Wobschall v. Department of the Air Force*, 43 M.S.P.R. 521, 523 (1990); *Kinney v. Department of the Interior*, 30 M.S.P.R. 170, 171-72 (1986). Here, however, the settlement agreement was not reached during the course of an appeal to the Board, and, therefore, was not made part of a Board record. *See Wobschall*, 43 M.S.P.R. at 523 (the Board has no authority to enforce settlement agreement reached during grievance). Thus, the Board has no authority to enforce the terms of this settlement agreement, and if the appellant seeks enforcement of the agreement, he must pursue it through the EEOC (through the agency's

Office of Civil Rights), as stated in part 7 of the agreement. *See* AF, Tab 14, Subtab 1 (at 18-19).

Second, the Board lacks jurisdiction over this appeal because by signing the EEOC settlement agreement, the appellant waived his appeal rights in the instant matter. Part 1 of the settlement agreement states that "[b]y this Agreement, the parties resolve all disputes between them concerning the Complainant's employment with the Agency, regardless of the forum, in existence on the effective date of this Agreement." AF, Tab 14, Subtab 1 (at 15).

With regard to the appellant's 30-day suspension, I also find that the Board lacks jurisdiction because the appellant agreed to the suspension voluntarily. The settlement agreement itself, which was signed by the appellant, states that it was "voluntarily enter[ed] into." AF, Tab 14, Subtab 1 (at 15). The appellant, however, claims that the agency "misrepresent[ed] the information" during the settlement process and "used ... the threat of termination to secure [his] signature involuntarily." AF, Tab 14 (at 1). He also alleges that he was coerced into accepting the agency's settlement terms because his other option was to accept the possibility of a removal. *See id.* However, the appellant has provided no evidence that tends to show misrepresentation or coercion, and, in fact, the record shows that during the settlement process his interests were represented by Johnny T. Zuagar, the president of the appellant's union. *See* AF, Tab 14, Subtab 1 (at 20), Subtab 3 (at 1); Tab 15, Subtab 4a. The appellant's belief that he had to choose between two unappealing options (possible removal and the settlement terms) does not amount to coercion on the part of the agency, nor does it vitiate the voluntariness of the settlement agreement. *See, e.g., McCorcle v. Department of*

Agriculture, 98 M.S.P.R. 363, 371 (2005); *see also Smitka v. U.S. Postal Service*, 66 M.S.P.R. 680, 687 (1995) (the mere fact that an employee is faced with unpleasant alternatives does not render his choice of one of those alternatives involuntary), *aff'd*, 78 F.3d 605 (Fed. Cir. 1996) (Table). Though the appellant would have faced the possibility of removal had he decided to forego settlement, there is no evidence to suggest that the agency used the possible termination as a threat to elicit his signature on the settlement agreement. Finally, it bears noting that in his response to the agency's letter of proposed removal, the appellant himself suggested settlement terms that included a suspension (albeit one of 14 days). AF, Tab 14, Subtab 2 (at 5). Because I find that the appellant voluntarily agreed to the 30-day suspension in question, the appellant has no right to appeal the action and thus the Board does not have jurisdiction over that part of his appeal.

With regard to the appellant's claim of involuntary retirement, I likewise conclude that the Board lacks jurisdiction over the matter because, as I determined above, the appellant voluntarily entered into the settlement agreement that required him to retire. Yet, even if the Board had jurisdiction to address the appellant's retirement, there is nothing in the record to suggest that the retirement was involuntary. On the contrary, the record shows that by signing the settlement, the appellant agreed to "[r]etire voluntarily effective no later than September 4, 2012." AF, Tab 14, Subtab 1 (at 15). Moreover, on March 29, 2012, the appellant submitted an application for the Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Pay (VSIP) plans. AF, Tab 15, Subtab 4b. On this form, the appellant attested to the

voluntary nature of his retirement and agreed, as part of VSIP, to accept a cash incentive of either $25,000 or an amount equal to the severance pay to which he would be entitled. *Id.* The fact that the appellant specifically applied for a "Voluntary Early Retirement" and stood to gain a financial benefit by retiring undercuts his argument that his retirement was involuntary. I therefore conclude, based on the record before me, that even if the Board had jurisdiction over the appellant's claim of involuntary retirement, said claim would fail on the merits.

Finally, to the extent that the appellant raises claims of reprisal for EEO activity and discrimination based on his age, race, and disability, the Board lacks jurisdiction absent an otherwise appealable action. Allegations of prohibited personnel practices under 5 U.S.C. § 2302(b) are not an independent source of Board jurisdiction. *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

DECISION

For the reasons stated above, the appeal is DISMISSED.

FOR THE BOARD: /s/
Daniel Madden Turbitt
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **September 3, 2012** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision,

supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the *earlier* date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The

date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and *Forms* 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

Docket Number: DC-0752-12-0487-I-1

DATE: May 7, 2012

ANTHONY W. PERRY,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Agency.

This document contains important information about this appeal and its processing. Please read the entire document carefully.

There are questions whether this appeal is within the Board's jurisdiction. As a result, the Board might dismiss the appeal for lack of jurisdiction without addressing the merits of the case. This Order provides necessary information concerning the jurisdictional issue and steps the appellant must take to show that the Board should not dismiss the appeal for lack of jurisdiction.

ORDER ON JURISDICTION AND PROOF REQUIREMENTS OVER INVOLUNTARY ACTIONS

The appellant's petition for appeal claims an involuntary retirement or resignation. I **ORDER** the parties to follow the procedures set out below. If either party has a question about any of the case processing instructions in this Order, you may telephone this office at the phone number listed at the end of the Order for assistance.

NOTICE TO THE APPELLANT

The Board may not have jurisdiction to decide an appeal from the kind of action you are challenging. Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board. I will dismiss your appeal, therefore, unless you make a non-frivolous allegation that you resigned or retired because of duress, coercion, or misrepresentation by the agency. If you are asking for a hearing, one will be held only if you support your claim with affidavits or other evidence of facts which, if proven, could show that your retirement or resignation was involuntary because of duress, coercion, or misrepresentation. Conclusory, vague, or unsupported allegations are not enough to meet this standard.

Specifically, you must make detailed factual allegations that one of the following things happened to you: (1) The agency made misleading statements on which you relied to your detriment; or (2) under all of the circumstances the agency made your working conditions so difficult because of discrimination or another reason that a reasonable person in your position would have felt compelled to resign or retire; or (3) you sought to withdraw your retirement or resignation prior to its effective date and the agency did not have a valid reason for not allowing its withdrawal; or (4) your resignation or retirement was the product of mental incompetence, or was secured in violation of the law; or (5) if you resigned or retired after the agency proposed to remove you, you may prove your claim by showing that the agency knew that the reason for the threatened removal could not be substantiated. Retirement after the agency issued its

decision to remove you, however, does not raise a question of voluntariness, and instead allows the Board to consider the merits of the removal.

If you make a non-frivolous allegation supported by affidavits or other evidence that your retirement or resignation is within the Board's jurisdiction, you must then establish that the Board has jurisdiction over your appeal by proving the same matters by preponderant evidence. You will be provided the opportunity to do this either at a hearing or during a further opportunity for the parties to develop the written record. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a disputed fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2). In other words, you must show that it is more likely than not that you were prevented from making a voluntary decision to resign or retire in one of the ways listed above.

The Board lacks jurisdiction over claims of prohibited discrimination that are not made in connection with a matter that is appealable to the Board. Thus, if you claim that discrimination caused you to resign or retire, I may only address that claim insofar as it is relevant to the issue of involuntariness. Only if you eventually prove that the Board has jurisdiction over your resignation or retirement may I then consider the merits of your discrimination claim under the standards of the applicable antidiscrimination statute.

I **ORDER** you to file evidence and/or argument amounting to a non-frivolous allegation that your claim of involuntary resignation or retirement is within the Board's jurisdiction. Your submission must be filed

within 10 calendar days of the date of this Order, and you must serve a copy of it on the agency at the same time. The agency may file a response on this jurisdictional issue within 20 calendar days of the date of this Order. Unless I tell the parties otherwise, the record on this issue will close on the date the agency's response is due. That means I will not accept any more evidence or argument prior to making a finding on whether you have made a non-frivolous allegation on the jurisdictional issue unless the party submitting it shows that the evidence or argument was not readily available prior to the close of the record. 5 C.F.R. § 1201.58(c).

If you did not make a non-frivolous allegation, I will dismiss your appeal. If you made such an allegation, I will schedule a hearing if you requested one or provide for the further supplementation of the record on the jurisdictional issue. In addressing this issue, you are **ORDERED** to address the fact that under provision 2 (a) and (b) of the August 22, 2011 settlement agreement you reached with the agency to resolve your EEO complaint, it states that you "acknowledg[e] that by entering this Agreement [your] decision to retire is both voluntary and irrevocable" and "that the reason given for [your] resignation will not be adverse or hostile to the Agency."

ORDER ON JURISDICTION OVER "MIXED CASES"

In addition, it appears that the Board may lack jurisdiction over your appeal for another reason. When an appellant has been subjected to an action that is appealable to the Board, and alleges that the action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex,

national origin, handicap, or age, he may initially file a mixed case complaint with his employing agency, or a mixed case appeal with the Board, but not both, and whichever is filed first is deemed to be an election to proceed in that forum. *See* 5 U.S.C. § 7702(a): *McCoy v. U.S. Postal Service,* 108 M.S.P.R. 160, ¶ 12 (2008); 29 C.F.R. § 1614.302(b): 5 C.F.R. § 1201.154(a)-(b). An election is not valid unless the agency has properly informed the appellant of the election requirement and its consequences. *See McCoy,* 108 M.S.P.R. 160, ¶ 14; *Dawson v. U.S. Postal Service,* 45 M.S.P.R. 194, 197 (1990).

Here, it seems as if you made an election to file a formal EEO complaint prior to filing your Board appeal. If you filed under more than one procedure, the procedure under which you timely filed first shall be considered to be your elected procedure. As a result, it appears as if you filed your mixed case EEO complaint on the same matter with the agency prior to bringing the same claims to the Board's attention. Thus, it appears that you made a valid election to pursue your EEO complaint before filing your Board. It is not clear if you have exhausted the agency's EEO procedure, which might allow you with the right to appeal from the agency's final decision to the Board under 5 C.F.R. § 1201.154(b)(1).

Both parties are directed to review the same deadlines as listed above and they must respond to this additional jurisdictional issue within the same timeframes set forth previously.

ORDER ON JURISDICTION OVER MATTERS PREVIOUSLY COVERED BY A SETTLEMENT AGREEMENT

Next, it appears that the Board would lack jurisdiction over this appeal for a third reason. It seems, based on the evidence submitted, that because the subject of this appeal concerns a matter you previously settled before the EEO, the Board cannot review the same claims over which you entered into a settlement agreement with the agency. *See, e.g., Callaghan v. U.S. Postal Service,* EEOC Petition No. 03990095 (June 14, 2000). In particular, according to provision 1 of the EEO settlement agreement, it states that the parties "resolve[d] all existing matters concerning [the Appellant's] employment with the Agency, including ... any outstanding appeal rights." The same provision further states that the parties "resolve[d] all disputes between them concerning [the Appellant's] employment with the Agency, regardless of the forum, in existence on the effective date of this Agreement."

In the alternative, you may be alleging he entered into the EEO settlement agreement involuntarily due to agency coercion, misrepresentation, or fraud, and may be arguing that the Board should set aside the agreement for those reasons.

The Board will review a settlement agreement between an agency and an agency employee under certain circumstances. First, if a settlement agreement is put into the Board's record for enforcement purposes, the Board maintains jurisdiction over the agreement for compliance purposes. *See Singletary v. U.S. Postal Service,* 88 M.S.P.R. 158 (2001). Here, there is no indication that

the parties' EEO agreement was ever put into the record of any Board appeal.

Second, a party may seek to set aside a settlement agreement by showing the agreement is invalid because it is unlawful or is the result of fraud, coercion, or mutual mistake. In this type of situation, it is unnecessary that the administrative judge had previously entered the agreement into the record for enforcement purposes, although that is usually the case. Nevertheless, even if the agreement was not entered into the record, the agreement must have been reached as part of a Board appeal for the Board to consider it. *See Owen v. U.S. Postal Service,* 87 M.S.P.R. 449, ¶ 3-6 (2000). In this case, it does not appear that the parties' agreement was reached pursuant to a Board appeal.

Third, although the Board lacks jurisdiction over adverse actions where an employee has waived his or her appeal rights in a last-chance settlement agreement (LCSA), the Board will not enforce such a waiver if an agency breaches an LCSA. *See Link v. Department of the Treasury,* 51 F.3d 1577, 1581 (Fed. Cir. 1995). Under these circumstances, the Board will review the LCSA to determine if a breach occurred. Therefore, an appellant can always argue he or she did not breach the agreement.

In the instant appeal, however, the parties' EEO settlement agreement does not appear to be an LCSA, and the agency did not predicate the appellant's retirement on any breach of that agreement. *See Gibson v. Department of Veterans Affairs,* 160 F.3d 722, 725 (Fed. Cir. 1998). In the standard LCSA, an appellant agrees to waive his right to appeal an adverse action in exchange for the agency's promise to

allow him to retain his employment so long as he meets certain agreed-upon standards of conduct. If the appellant fails to meet those standards, then the agency effects the adverse action that was held in abeyance pending the duration of the LCSA.

Fourth, while the Board does not have the authority to enforce a settlement agreement not entered into the Board's record for enforcement purposes, the Board may consider the validity of agreements entered into proceedings not before the Board so as to determine their effect on a personnel action before the Board. *See Sullivan v. Department of Veterans Affairs*, 79 M.S.P.R. 81, 84 (1998). For example, the Board will consider the validity of a settlement agreement providing that an appellant resign from his position because an involuntary resignation is tantamount to a removal. *See Short v. U.S. Postal Service*, 66 M.S.P.R. 214, 218 (1995). Yet, in the present case, it seems the parties' EEO settlement agreement had no effect on the personnel action before the Board. *Cf. Williams v. U.S. Postal Service*, 95 M.S.P.R. 145, ¶¶ 7-10 (2003) (the Board found that the parties' settlement agreement was analogous to a LCSA, where the appellant agreed to a demotion in the event that the Office of Personnel Management (OPM) did not approve his application for disability retirement benefits, and then appealed that demotion when OPM denied his application).

Because the parties' EEO settlement agreement does not fit into any of the categories I have outlined above, it seems the Board lacks the authority to consider it. Allegedly involuntary settlement agreements are not independently appealable to the Board in every circumstance. As a result, it appears

that the Board lacks jurisdiction over both the appellant's retirement/resignation and any issue relating to his EEO settlement agreement with the agency. *See Shelton v. Department of the Air Force*, 382 F.3d 1335, 1337 (Fed. Cir. 2004); *Ramos v. Department of Justice*, 94 M.S.P.R. 623, ¶¶ 6-12 (2004).

The parties must review the same deadlines set forth above and must address this third jurisdictional issue within the same timeframes.

FOR THE BOARD: /s/ _____
Daniel Madden Turbitt
Administrative Judge

5 U.S.C. § 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title,

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

5 U.S.C. § 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 U.S.C. § 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate

procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

* * *

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of

this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel

practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

* * *

Supreme Court, U.S.
FILED
DEC - 5 2016
OFFICE OF THE CLERK

No. 16-399

In the Supreme Court of the United States

ANTHONY W. PERRY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 5 U.S.C. 7703(b)(2), which creates an exception to exclusive Federal Circuit review of Merit Systems Protection Board decisions in cases where "an action which [an] employee * * * may appeal to the [Board]" is alleged to involve discrimination, 5 U.S.C. 7702(a)(1)(A), applies to a case in which the Board determines that the relevant action is not one that an employee may appeal to the Board.

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MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 829 F.3d 760. The final order of the Merit Systems Protection Board (Pet. App. 20a-31a) is unreported but is available at 2014 WL 5358308. The initial decision of an administrative judge (Pet. App. 32a-58a) is unreported. An earlier order of the Merit Systems Protection Board (Pet. App. 59a-70a) is unreported but is available at 2013 WL 9678428. An earlier initial decision of an administrative judge (Pet. App. 71a-80a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2016. The petition for a writ of certiorari was filed on September 27, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, creates a comprehensive "framework for evaluating adverse personnel actions against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (brackets omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 774 (1985)). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* Among other things, the CSRA creates the Merit Systems Protection Board (MSPB or Board), "an independent Government agency that operates like a court," 5 C.F.R. 1200.1, and has "jurisdiction" to hear and decide certain employment-related matters, 5 U.S.C. 1204(a)(1). See 5 U.S.C. 1201. "The jurisdiction of the [B]oard is not plenary but is limited to those actions which are made appealable to it by law, rule, or regulation." *Synan* v. *MSPB*, 765 F.2d 1099, 1100 (Fed. Cir. 1985); see 5 U.S.C. 7701(a); see also, *e.g.*, 5 U.S.C. 7512 (listing appealable actions).

In general, judicial review of "a final order or final decision" of the Board falls within the "exclusive jurisdiction" of the Federal Circuit. 28 U.S.C. 1295(a)(9); see 5 U.S.C. 7703(b)(1)(A) and (d). The CSRA includes two exceptions to that general rule. See 5 U.S.C. 7703(b)(1)(B) and (b)(2). The only one that is relevant here is an exception for "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2); see Pet. App. 5a. Such cases, commonly known as "mixed cases," are defined as ones in which an "employee or applicant for employment" both "has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board" and "alleges that a basis for the action was

discrimination prohibited by" one of several listed antidiscrimination laws. 5 U.S.C. 7702(a)(1)(A)-(B). An employee with such a case may bring that case before the MSPB and, if unsuccessful there, file suit in district court, rather than seeking review in the Federal Circuit. 5 U.S.C. 7702(a)(1); see 5 U.S.C. 7702(a)(2)-(3) and (b)(1), 7703(b)(2).

2. Petitioner is a former employee of the United States Census Bureau who faced removal on charges that he was absent from work for hours at a time and refused to document his time properly. Pet. App. 3a. In response to the notice of removal, petitioner claimed that he had an informal arrangement that permitted him to take walking breaks to relieve a medical condition. *Ibid.* Petitioner eventually entered into a settlement agreement with the Bureau, under which, *inter alia*, the Bureau agreed to dismiss the pending disciplinary action and petitioner agreed to serve a 30-day suspension, take an early retirement, and dismiss a complaint he had filed with the Equal Employment Opportunity Commission. *Ibid.*

Petitioner later appealed his suspension and retirement to the MSPB, alleging that the Bureau's charges had been motivated by age, race, and disability discrimination and retaliation for his filing of discrimination claims. Pet. App. 4a. He also alleged that the Bureau coerced him into signing the settlement agreement by threatening baseless discriminatory adverse employment actions and by misrepresenting his procedural rights. *Id.* at 4a, 22a-23a. That second set of allegations was critical to the Board's jurisdiction. *Id.* at 4a. "[B]ecause the Board generally lacks jurisdiction to review voluntarily accepted actions, * * * its jurisdiction in this case depended on the validity of

[petitioner's] contention that the settlement—and hence, the resulting suspension and retirement—had been involuntary." *Ibid.* (citing 5 U.S.C. 7512(1)-(5); 5 C.F.R. 752.401(b)(9); *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc)).

An MSPB administrative judge ultimately determined, following a hearing, that petitioner had "failed to prove that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals." Pet. App. 33a; see *id.* at 22a-23a. The administrative judge accordingly concluded that the "appeal must be dismissed for lack of jurisdiction." *Id.* at 33a. The Board affirmed, explaining, *inter alia*, that "contrary to [petitioner's] contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it." *Id.* at 30a; see *id.* at 20a-32a.

3. Petitioner, proceeding pro se, sought judicial review in the D.C. Circuit. Pet. App. 4a. He ultimately acknowledged, however, that no provision of the CSRA would give the D.C. Circuit jurisdiction over the case. *Id.* at 5a. The court of appeals accordingly considered, with the aid of an appointed amicus curiae, the question of where to transfer the case. *Ibid.*; see 28 U.S.C. 1631 (permitting transfers of petitions for review of administrative action in order to cure lack of jurisdiction). The court concluded that the Board's decision was within the scope of the Federal Circuit's exclusive review and ordered the case to be transferred there. Pet. App. 1a-15a.

The court of appeals rejected the argument that 5 U.S.C. 7703(b)(2)'s special rule for mixed cases—*i.e.*, cases in which an employee alleges discrimination in "an action which [he] may appeal to the [Board],"

5 U.S.C. 7702(a)(1)—should apply to a case in which the underlying action has been determined not to be appealable to the Board. Pet. App. 7a-15a. The court observed that one of its previous decisions, *Powell* v. *Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998), had identified the Federal Circuit as the proper venue for judicial review in such a case. Pet. App. 7a-8a. And the court determined that *Powell*'s holding with respect to such MSPB "*jurisdictional* dismissals" was consistent with this Court's intervening decision in *Kloeckner* v. *Solis*, 133 S. Ct. 596 (2012), which held that MSPB "*procedural* dismissals" in mixed cases should be reviewed "in district court." Pet. App. 3a; see *id.* at 9a-15a.

The court of appeals noted that petitioner (and his amicus) "agree[d] that *Kloeckner* did not involve the precise issue raised by * * * this case." Pet. App. 8a. As the court explained, "*Kloeckner* did not involve a jurisdictional dismissal," but instead the dismissal "on the procedural ground of untimeliness" of an "adverse action" that was "no doubt * * * within the Board's jurisdiction." *Ibid.* The court observed that *Kloeckner* "specifically defined the issue" before it "by reference to MSPB dismissals on 'procedural grounds,'" *id.* at 8a-9a (quoting *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607), and that briefing and oral argument had highlighted the potential for a "material distinction between procedural and jurisdictional dismissals" with respect to judicial review. *Id.* at 9a-10a. And the court highlighted *Kloeckner*'s emphasis on the fact that "[n]o one here contests that Kloeckner * * * was affected by an action (*i.e.*, removal) appealable to the MSPB." *Id.* at 12a (brackets in original) (quoting *Kloeckner*, 133 S. Ct at 604).

The court of appeals accordingly joined the Federal Circuit in concluding that this Court's holding in *Kloeckner* does not extend to MSPB jurisdictional dismissals. Pet. App. 12a-14a (citing *Conforto* v. *MSPB*, 713 F.3d 1111 (Fed. Cir. 2013)). The court of appeals reasoned that the language of the CSRA—which "describes a mixed case as one in which the employee both alleges discrimination and 'has been affected by an action which [she] *may appeal* to the' MSPB"—"suggests a distinction between jurisdictional dismissals * * * and procedural dismissals." *Id.* at 11a-12a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). In a procedural dismissal, even if an appeal was brought "in a procedurally deficient fashion," the "*action* affecting the employee" nevertheless "is one she can appeal to the Board," and the case can in fact be heard by the Board if it chooses to disregard the procedural defect. *Id.* at 13a-14a. In a jurisdictional dismissal, however, the employee "has been affected by an action which she may *not* appeal to the MSPB." *Id.* at 12a. "The case, in other words, turns out not to be a mixed case after all—it is not one 'appealable to the MSPB.'" *Ibid.* (quoting *Kloeckner*, 133 S. Ct. at 604).

ARGUMENT

The court of appeals correctly held that when the MSPB determines that it does not have jurisdiction to review a particular personnel action, the case should not be treated, for purposes of judicial review, as one involving "an action which the employee * * * may appeal to the Merit Systems Protection Board," 5 U.S.C. 7702(a)(1)(A); see 5 U.S.C. 7703(b)(2). The decision below does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The CSRA's special judicial-review provision for mixed cases, 5 U.S.C. 7703(b)(2), is limited to cases in which an employee (or applicant for employment) "challenges as discriminatory *a personnel action appealable to the MSPB*." *Kloeckner* v. *Solis*, 133 S. Ct. 596, 602 (2012) (emphasis added). Specifically, the exception to Federal Circuit review applies only when an employee *both* "has been affected by an action which [he] may appeal to the Merit Systems Protection Board" *and* "alleges that a basis for the action was discrimination prohibited by" a listed antidiscrimination law. 5 U.S.C. 7702(a)(1); see 5 U.S.C. 7703(b)(2); *Kloeckner*, 133 S. Ct. at 601-602.

Not all unfavorable personnel actions meet the first criterion. Rather, "[i]f (but only if) the action is particularly serious"—such as "a removal from employment or a reduction in grade or pay"—does "the affected employee ha[ve] a right to appeal the agency's decision to the MSPB." *Kloeckner*, 133 S. Ct. at 600. "Thus, for example, if an employee sought Board review of a minor disciplinary action, such as suspension for fewer than 15 days, the appeal would plainly be outside the Board's jurisdiction, and review of the Board's decision would be in [the Federal Circuit], not in the district court, even if the employee contended that the action was taken because of discriminatory animus." *Conforto* v. *MSPB*, 713 F.3d 1111, 1118 (Fed. Cir. 2013).

Accordingly, "the plain import of th[e] statutory language is that a purported mixed case appeal is reviewed by a district court only if the Board has jurisdiction to decide the appeal from the adverse action in issue." *Conforto*, 713 F.3d at 1118. Where, as here, the Board has determined that it lacks jurisdiction

because the underlying action is not one that is appealable to it, there is no valid foundation for treating the case as a mixed case for purposes of judicial review. See *ibid.*; Pet. App. 12a-13a.

2. a. Petitioner does not directly dispute the general proposition that an employee who has *not* been "affected by an action which [he] may appeal to the Merit Systems Protection Board," 5 U.S.C. 7702(a)(1)(A), is not bringing a mixed case and thus cannot avail himself of the special judicial-review procedures that 5 U.S.C. 7703(b)(2) provides for such cases. He contends, however, that notwithstanding the MSPB's determination that the underlying action in his case is not appealable and that no mixed case is presented, Section 7703(b)(2) should nevertheless apply. In advancing that argument, he appears to be advocating one of three potential legal rules, all of which are unsound.

The first potential rule would be that *every* case should be treated as involving "an action which [an employee] may appeal to the Merit Systems Protection Board," 5 U.S.C. 7702(a)(1)(A), so long as "a claimant *alleges*" that it involves such an action, Pet. 16 (emphasis added), no matter how transparently incorrect the claimant's allegation may be. Under that rule, notwithstanding that a suspended employee typically has the right to appeal to the MSPB only when the suspension exceeds 14 days, see 5 U.S.C. 7512(2), an employee suspended for one day but who claims to have been suspended for a month is entitled to district-court review of an MSPB decision dismissing his appeal for lack of jurisdiction. That rule makes no sense and cannot be squared with the statutory text, which "requires that the Board actually have jurisdiction over

the employee's claim, not merely that the employee allege Board jurisdiction." *Conforto*, 713 F.3d at 1118; see 5 U.S.C. 7702(a)(1)(A).

The second potential rule would be that Section 7703(b)(2) applies to a *subset* of cases in which an employee contests the MSPB's determination that the underlying action is not appealable. But petitioner does not identify what that subset would be, and the CSRA itself provides no basis for differentiating among cases that involve such a determination by the Board. The requirement of "an action which the employee * * * may appeal to the Merit Systems Protection Board" speaks in absolute terms. Nothing in the statute suggests that, when the MSPB has determined that an action is not appealable, the action may be treated as though it were, provided that some (unspecified) decisionmaker finds some (unspecified) criterion to be met. Moreover, as petitioner himself acknowledges, "administrative simplicity is a major virtue in a jurisdictional statute," Pet. 18 (quoting *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010)), and a rule that subdivides the universe of MSPB nonappealability determinations based on nonstatutory criteria applied by an unidentified decisionmaker would lack that virtue.

The third potential rule would be that *this particular case* should be treated as a mixed case, because (in petitioner's view) the critical issue for purposes of the underlying action's appealability to the Board—"whether or not the settlement was voluntary"—can also be seen, in light of petitioner's claim that the settlement was discriminatorily coerced, as "the key merits issue." Pet. 14 (emphasis omitted); see Pet. 14-16. As a threshold matter, such a fact-specific rule would be inconsistent with the more general question

presented in the petition—which presumes a "jurisdictional" dismissal, not a merits decision, see Pet. i—and would address only cases that are akin to petitioner's. In any event, petitioner's argument is misconceived. "The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351-352 (2011), and does not make the MSPB's jurisdictional determination in this case any less jurisdictional. Furthermore, the Federal Circuit has explained that, in the context of an allegedly involuntary separation, "involuntariness and discrimination" are "distinct issues," because "[c]oercion can be found without proof that the improper conduct was the product of discrimination, and discrimination can be found without proof that the discriminatory conduct was so serious as to compel the employee to resign." *Conforto*, 713 F.3d at 1120 (citing *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1341 (Fed. Cir. 2006) (en banc)).

b. Contrary to petitioner's contention (Pet. 9-14), nothing in this Court's decision in *Kloeckner* supports the argument that this case should have been treated as a mixed case. The Court held in *Kloeckner* that "when the MSPB dismisses an appeal alleging discrimination * * * on *procedural* grounds," the employee's petition for judicial review "should go to district court." 133 S. Ct. at 600 (emphasis added). As the court of appeals in this case observed (Pet. App. 9a-10a), *Kloeckner*'s framing of the question presented as involving an MSPB dismissal on "procedural grounds," not jurisdictional grounds, was repeated

throughout the decision. See *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607.

The Court in *Kloeckner* emphasized that "[n]o one here contests that Kloeckner brought a mixed case—that she was affected by an action (*i.e.* removal) appealable to the MSPB and that she alleged discrimination prohibited by an enumerated federal law." 133 S. Ct. at 604. By satisfying those statutory requirements, she had "brought the kind of case that the CSRA routes * * * to district court," "[r]egardless whether the MSPB dismissed her claim on the merits or instead threw it out as untimely." *Ibid.* Those requirements, the Court explained, are what "matters"—indeed, "all that matters"—"under the CSRA's terms." *Ibid.*

This case, in contrast, differs from *Kloeckner* on the issue "that matters," 133 S. Ct. at 604. Unlike in *Kloeckner*, the MSPB here determined that petitioner was *not* "affected by an action * * * appealable to the MSPB" and thus had *not* "brought the kind of case that the CSRA routes * * * to district court," *ibid.*; see Pet. App. 20a-32a. Petitioner's reliance on *Kloeckner* for the proposition that "'mixed cases shall be filed in district court,' regardless of whether the MSPB reached the merits of the discrimination claim or disposed of the case on non-merits grounds," Pet. 10 (quoting *Kloeckner*, 133 S. Ct. at 604), thus simply begs the question whether this is a "mixed case" to begin with.

Petitioner would have the courts treat this as a mixed case simply because he labels it one, irrespective of the MSPB's contrary determination. For reasons already discussed, that is not a reasonable construction of the CSRA. "[W]hen an employee brings a

case she believes qualifies as a mixed case to the MSPB but the Board dismisses her appeal based on a lack of jurisdiction, * * * [t]he case * * * turns out not to be a mixed case after all—it is not one 'appealable to the MSPB.'" Pet. App. 12a (quoting *Kloeckner*, 133 S. Ct. at 604). If an employee believes that the MSPB has erred in its jurisdictional determination, he may raise that issue in the Federal Circuit; if he prevails, the case will be remanded to the MSPB for adjudication and then be treated as a mixed case for purposes of any further judicial review.

Petitioner attempts (Pet. 10-13) to support his reading of *Kloeckner* by noting that both parties in *Kloeckner* disavowed a distinction between procedural and jurisdictional dismissals. But the fact that the parties in *Kloeckner* did not advocate a distinction between jurisdictional and procedural MSPB dismissals makes it even more significant that this Court consistently limited its analysis and holding to MSPB dismissals on "procedural grounds." And the suggestion (Pet. 19) that the government has taken "diametrically opposed positions" in this case and *Kloeckner* is unfounded. The government in *Kloeckner* took as a given that the MSPB's jurisdictional dismissals were not reviewable in district court and advanced that as a reason why the MSPB's procedural dismissals should not be reviewable in district court either. See Pet. 11-12 (citing government's briefs). That argument did not prevail, but nothing in *Kloeckner* suggests that cases should be treated as mixed even when the MSPB determines that they do not meet the statutory criteria for such treatment.

c. Petitioner's additional arguments are similarly flawed.

Petitioner errs in suggesting (*e.g.*, Pet. 14) that the CSRA provides no textual basis for distinguishing between procedural and jurisdictional dismissals in this context. As the court of appeals explained, under the plain language of the statute, when an appeal is dismissed on procedural grounds, the employee can still "be seen to have 'been affected by an action which [she] may appeal to the' MSPB." Pet. App. 13a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). "That statutory language draws attention to the contested 'action,' and in the case of a procedural dismissal, the *action* affecting the employee is one she can appeal to the Board." *Ibid.* Indeed, the Board has authority to "excuse the procedural error and permit the appeal to go forward." *Ibid.*; see *id.* at 13a-14a (citing 5 C.F.R. 1201.12, 1201.22(c); *Conforto*, 713 F.3d at 1118 n.1). In cases where the Board dismisses for lack of jurisdiction, however, it "necessarily concludes" that the employee "has not 'been affected by an action which [she] may appeal to the' MSPB." Pet. App. 12a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)).

Petitioner likewise errs in suggesting (Pet. 16) that the court of appeals' approach "renders illogical" the "statutory requirement for the Board to decide 'mixed' cases within 120 days," which appears in 5 U.S.C. 7702(a)(1). Section 7702(a)(1)'s time limit for "decid[ing] both the issue of discrimination and the appealable action," in a case where an employee alleges discrimination in "an action which the employee or applicant may appeal to the Merit Systems Protection Board," cannot plausibly be construed to require treating a case that does not involve such an action as one that does. See *Kloeckner*, 133 S. Ct. at 606 (construing 120-day rule as "only a timing requirement" and

declining to view it as determinative of the forum for judicial review). Contrary to petitioner's contention, the time limit does not apply when "a claimant *alleges*" that she has brought a mixed case, Pet. 16 (emphasis added); it applies only when the claimant *has* brought a mixed case. See *Conforto*, 713 F.3d at 1118. And nothing in the time limit necessitates "the determination of whether a case is 'mixed' must occur at the time of filing," Pet. 16 (emphasis omitted). Although an employee's allegation at the time of filing that he has been subject to a discriminatory appealable action might require that his case presumptively be treated as subject to the time limit, that allegation would not preclude the Board from later determining that the allegation of appealability is incorrect and that it lacks jurisdiction.

Finally, petitioner provides no meaningful support for his contention (Pet. 17) that routing cases to the right court will present "monumental practical difficulties." The Board's decision here clearly stated that "contrary to [petitioner's] contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it," and the Board explicitly informed petitioner that he could seek judicial review in the Federal Circuit. Pet. App. 30a. Petitioner presents no evidence that other decisions will be more confusing. And where an employee mistakenly files in the wrong court, that court will have the ability to transfer the case to the correct one—as the court of appeals did here, when petitioner filed in a court that was not the appropriate forum for either a mixed case or a non-mixed case. See 28 U.S.C. 1631; Pet. App. 5a.

3. Petitioner's assertion (Pet. 19) that "the courts of appeals are squarely divided" on the question presented is incorrect. Petitioner acknowledges (*ibid.*) that the decision below accords with decisions of the Second, Tenth, and Federal Circuits, all of which have interpreted the CSRA to vest the Federal Circuit with exclusive jurisdiction in cases like this. See *Conforto*, 713 F.3d at 1118; *Harms* v. *IRS*, 321 F.3d 1001, 1008 (10th Cir.), cert. denied, 540 U.S. 858 (2003); *Downey* v. *Runyon*, 160 F.3d 139, 146 (2d Cir. 1998). The only decision petitioner asserts (Pet. 19) to be in conflict with the decision below is the Eighth Circuit's decision in *Kloeckner* v. *Solis*, 639 F.3d 834 (2011), which was subsequently reversed by this Court, see 133 S. Ct. at 607. It is unclear what precedential weight a future Eighth Circuit panel would attach to that decision. And in any event, the Eighth Circuit in *Kloeckner* reasoned that *both* jurisdictional *and* procedural dismissals should be reviewed in the Federal Circuit. See 639 F.3d at 838. For all the reasons discussed above, this Court's reversal on the latter issue does not compel any particular conclusion on the former. See Pet. App. 3a, 8a-13a; *Conforto*, 713 F.3d 1117-1119.

In light of the uniformity in the circuits, no "clarification" (Pet. 19) from this Court is necessary. Nor, in any event, is petitioner correct in suggesting (Pet. 19-20) that this case is the Court's last chance to address the question presented. Experience has shown that claimants who believe their cases belong in district court will file there, notwithstanding any MSPB guidance to the contrary. See *Kloeckner*, 639 F.3d at 836 (claimant filed in district court notwithstanding advisement to file in the Federal Circuit); *Burzynski* v. *Cohen*, 264 F.3d 611, 616 (6th Cir. 2001) (similar);

Powell v. *Department of Def.*, 158 F.3d 597, 598 (D.C. Cir. 1998) (similar); *Sloan* v. *West*, 140 F.3d 1255, 1258 (9th Cir. 1998) (similar). Should a claimant do so, the question presented here could potentially be addressed by the regional circuit on appeal. And even if the district court simply transferred the case to the Federal Circuit (see Pet. 20), the claimant could seek review of the question presented in this Court following a final decision from the Federal Circuit. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 16-399

IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Government's brief in opposition only confirms that this Court's review is warranted. Just five years ago, in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), the Government told this Court that a distinction between procedural and jurisdictional dismissals "has no basis" in the MSPB's judicial-review statute, is "difficult and unpredictable" to apply in practice, and "make[s] little sense." Br. for Resp. in Opp. at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted); Br. for Resp. at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261, at *25 n.3. Now, in a stark about-face, the Government contends that this distinction is mandated by the statute, workable, and sensible. But the statute has not changed; only the Government's position has.

The Government nonetheless urges this Court to deny review by arguing that (1) the decision below is correct on the merits, *see* Opp. 7-14, and (2) the decision does not otherwise warrant this Court's review, *see id.* at 15-16. As explained below, the Government is wrong on both scores.

ARGUMENT

I. The Government's Efforts To Defend The Decision Below On The Merits Are Unavailing.

The Government argues that this case begins and ends with the statutory definition of a "mixed" case: one in which a federal employee or applicant (1) "has been affected by an action which the employee or applicant may appeal to the Merit Systems

Protection Board," and (2) "alleges that a basis for the action was discrimination prohibited by" certain enumerated civil-rights laws. 5 U.S.C. § 7702(a)(1)(A),(B), Pet. App. 93a. According to the Government, a case dismissed by the Board on jurisdictional (as opposed to procedural) grounds by definition is not "an action which the employee or applicant may appeal to the Merit Systems Protection Board," and thus does not qualify as a "mixed" case subject to review in federal district court. *See* Opp. 7-8.

That argument is manifestly incorrect. Just because the Board places a "jurisdictional" label on its dismissal of a claim does not mean that the Board lacked adjudicatory authority over that claim in the first instance. One could always say—accepting the conclusion as the premise—that a case could not be brought if it fails to satisfy all the elements of the cause of action. But that approach conflates jurisdiction with the merits. Conditioning the forum for judicial review on the Board's ultimate determination whether a claimant actually suffered an adverse employment action is just the sort of "hidden" or "roundabout way of bifurcating judicial review of the MSPB's rulings in mixed cases" that this Court rejected in *Kloeckner*. 133 S. Ct. at 605.

Here, there is no dispute that the Board had jurisdiction to resolve petitioner's claim that his settlement with the Census Bureau was involuntary, and that he was thus "affected by an action which [he] may appeal to the Merit Systems Protection Board." 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a. Indeed, the Board exercised jurisdiction over that claim not once but twice and rendered two decisions.

See Pet. App. 59-70a (first decision); Pet. App. 20-31a (second decision). The fact that the Board ultimately *rejected* petitioner's claim of involuntariness on the merits did not retroactively divest the Board of jurisdiction to render that decision. Because the Board indisputably had—and exercised—jurisdiction over this case, the suggestion that this is not a case that petitioner could "appeal to the Merit Systems Protection Board," 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a, is wholly insubstantial.

Nor is this some arcane principle of civil-service law. Rather, as explained in the petition, "it is black-letter law that an adjudicatory body does not lack jurisdiction to address a claim simply because the claim may fail on the merits." Pet. 15 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Ostensible federal questions fail on the merits every day in federal court, but "it is an old, old principle that the plaintiff's loss on the merits does not retroactively divest the court of jurisdiction." *Mid-Am. Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 292 (7th Cir. 1995) (Easterbrook, J.).

Although petitioner made this straightforward point in his petition, *see* Pet. 15-16, the Government offers no response. Rather, the Government simply insists that "[w]here, as here, the Board has determined that it lacks jurisdiction because the underlying action is not one that is appealable to it, there is no valid foundation for treating the case as a mixed case for purposes of judicial review." Opp. 7-8. But that argument begs the question whether the action was appealable the Board in the first place. Here, it clearly was. As noted above, the

Government does not, and cannot, deny that petitioner was entitled to challenge the voluntariness of his settlement with the Census Bureau by "appeal to the Merit Systems Protection Board." 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a. Because petitioner could, and did, challenge the voluntariness of his settlement before the Board and alleged discrimination, this is a "mixed" case regardless of the Board's resolution of petitioner's challenge to the voluntariness of the settlement. *See Kloeckner*, 133 S. Ct. at 604.

Indeed, as petitioner pointed out, the statute would be incoherent if there were no way to determine whether a case is "mixed" unless and until the Board resolved the case on the merits. *See* Pet. 16. The statute requires the Board to resolve "mixed" cases within 120 days; if the Board fails to do so, the employee may then proceed directly to district court. *See* 5 U.S.C. § 7702(a)(1),(2), Pet. App. 93-94a; *id.* § 7702(e)(1), Pet. App. 94-95a. Needless to say, this regime requires a determination whether a case is "mixed" at the outset. That approach comports with the general rule that jurisdiction is established (or not) at the time of filing, and is unaffected by subsequent events. *See, e.g.*, *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-71 (2004). "This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure." *Id.*

The Government insists, however, that a case can "presumptively" be treated as mixed (and thus subject to the 120-day rule) when an employee files an appeal with the Board, but can be reclassified as non-mixed if the Board "later determin[es] that the

allegation of appealability is incorrect and that it lacks jurisdiction." Opp. 14. But both the Board and the employee need to know at the outset whether the case is mixed, because the Board needs to know how quickly to rule, and the employee needs to know if he or she can proceed to district court after 120 days. Nothing in the statute contemplates a "presumptive" mixed claim that becomes a non-mixed claim (and retroactively alters the deadlines) if and when the Board ultimately rejects the claim on the merits.

In fact, if the Government is right here, then *Kloeckner* was wrongly decided. As the Government explained in that case, the determination whether a case is "mixed" has nothing to do with whether it is dismissed on "procedural" or "jurisdictional" grounds. An employee who violates the Board's procedural rules (for example, as in *Kloeckner*, by filing an untimely appeal) *also* "may [not] appeal to the Merit Systems Protection Board." 5 U.S.C. § 7702(a)(1)(A), Pet. App. 93a; *see also Stahl v. MSPB*, 83 F.3d 409, 412-13 (Fed. Cir. 1996). As the Government put it:

> The procedural-jurisdictional distinction rests on the premise that an appeal beyond the MSPB's jurisdiction "does not involve 'an action which the employee or applicant may appeal to the [Board]'" under Section 7702(a). *But that description applies equally to an appeal, like this one, that is not timely filed.*

Kloeckner Opp. at 15, 2011 WL 6281813, at *15 (emphasis added; citation omitted). Thus, although the appeal in *Kloeckner* was concededly untimely, this Court held that it was still a "mixed" case for purpose of the MSPB judicial-review statute because it was (1) "appealable to the MSPB," and (2) "alleged

discrimination prohibited by an enumerated federal law." 133 S. Ct. at 604. Whether the MSPB reaches the merits of a discrimination claim, or instead dismisses the case as untimely (whether on "procedural" or "jurisdictional" grounds) has nothing to do with the appropriate court for reviewing the MSPB's decision. *See Kloeckner* Opp. at 15, 2011 WL 6281813, at *15; *see also Conforto v. MSPB*, 713 F.3d 1111, 1124 (Fed. Cir. 2013) (Dyk, J., dissenting).

The Government's position here, as in *Kloeckner*, is thus "a contrivance, found nowhere in the statute's provisions on judicial review." 133 S. Ct. at 605. Indeed, that position defeats the whole point of bifurcating judicial review of MSPB decisions. Congress created an exception to the general rule that MSPB decisions are subject to judicial review in the Federal Circuit to protect federal employees' statutory "right" to *de novo* judicial review of their discrimination claims in district court. 5 U.S.C. § 7703(c), Pet. App. 99a; *see also* S. Rep. No. 95-969, at 63 (1978). That regime would make no sense if cases involving discrimination claims were routed to the Federal Circuit, where they would be subject to deferential review under the Administrative Procedure Act. *See, e.g., Shoaf v. Department of Agr.*, 260 F.3d 1336, 1340 (Fed. Cir. 2001); *Conforto*, 713 F.3d at 1127 (Dyk, J., dissenting). Thus, as this Court explained in *Kloeckner*, MSPB decisions in cases involving discrimination claims are subject to review in federal district court *regardless* of whether the Board reaches the merits of those claims. *See Kloeckner*, 133 S. Ct. at 603-04. That point was the beginning and the end of the analysis in *Kloeckner*, and should be the beginning and the end of the analysis here.

II. The Government's Efforts To Minimize The Importance Of This Case Are Unavailing.

Apart from the merits, the Government contends that "[f]urther review is unwarranted" because "[t]he decision below does not conflict with any decision of this Court or another court of appeals." Opp. 6; *see also id.* at 15-16. Again, the Government is wrong.

The decision below rests on an ostensible distinction between MSPB dismissals on "jurisdictional" grounds (reviewable in the Federal Circuit) and "procedural" grounds (reviewable in district court). *See* Pet. App. 5-15a; *see also Conforto*, 713 F.3d at 1118; *Harms v. IRS*, 321 F.3d 1001, 1008 (10th Cir. 2003); *Downey v. Runyon*, 160 F.3d 139, 146 (2d Cir. 1998). The Government, as noted above, expressly rejected that distinction in *Kloeckner*, arguing that it "has no basis" in the statute, is "difficult and unpredictable" to apply in practice, and "make[s] little sense." *Kloeckner* Opp. at 15, 2011 WL 6281813, at *15 (internal quotation omitted); *Kloeckner* Resp. Br. at 25 n.3, 2012 WL 2883261, at *25 n.3. In support of that argument, the Government relied on the Eighth Circuit's decision in *Kloeckner*, which also rejected that distinction as resting on "an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions." *Kloeckner v. Solis*, 639 F.3d 834, 838 (8th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 596 (2012). Because nothing in this Court's *Kloeckner* ruling purported to disturb the Eighth Circuit's decision on this score, the Government's assertion that "[i]t is unclear what precedential weight a future Eighth Circuit panel

would attach to that decision," Opp. 15, can only be characterized as wishful thinking.

But even if there were no circuit conflict on the validity of the procedural-jurisdictional distinction, this case would warrant this Court's review. This Court does not await a circuit conflict on matters within the Federal Circuit's exclusive jurisdiction, because by definition such a conflict cannot arise except insofar as a litigant files in another court and that court refuses to transfer the case to the Federal Circuit. Here, the Federal Circuit has squarely held that MSPB cases alleging discrimination but dismissed on "jurisdictional" grounds fall within its exclusive jurisdiction. *See Conforto*, 713 F.3d at 1115-21. The MSPB thus directs the claimants in such cases—many, if not most, of whom proceed *pro se*—to seek review in the Federal Circuit. *See* Pet. App. 30a ("You have the right to request review of this final decision *by the United States Court of Appeals for the Federal Circuit.*") (emphasis added). Because the MSPB is affirmatively channeling these cases to the Federal Circuit, the normal process through which a circuit conflict might be expected to develop has been thwarted.

Not to worry, says the Government: some claimants may ignore the MSPB's directive and file in district court, and "[s]hould a claimant do so, the question presented here could potentially be addressed by the regional circuit on appeal." Opp. 15-16. That argument is disingenuous at best. Claimants should not be expected to disregard the MSPB's directives, and courts should not be expected to look kindly on any such disregard. *See, e.g.*, *Glaude v. Postmaster General*, No. 14-4071, 2015 WL

136386, at *3 (N.D. Cal. Jan. 8, 2015) (dismissing *pro se* case filed in district court rather than the Federal Circuit, and chastising the claimant for ignoring the MSPB's directive to pursue review in the Federal Circuit), *aff'd*, No. 15-15241, 2016 WL 4989972 (9th Cir. Sept. 19, 2016). To ask claimants—especially *pro se* claimants—to fight the Government on the jurisdictional issue, as opposed to accepting transfer to the Federal Circuit, is to ask them to play Russian roulette with their claims. And if a district court transfers a case to the Federal Circuit, *see, e.g.*, *Winns v. MSPB*, No. 15-2313, 2015 WL 6602518, at *6 (N.D. Cal. Oct. 30, 2015), a claimant could obtain review in the regional circuit only by seeking an extraordinary writ of mandamus, *see, e.g.*, *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 548-51 (D.C. Cir. 1992)—again, an unreasonable and unrealistic burden.

Indeed, the Government does not believe its own argument that, absent review here, the issue is likely to percolate in other courts. To the contrary, the Government seeks to downplay the "'practical difficulties'" presented by the procedure/jurisdiction distinction by emphasizing that cases dismissed by the MSPB on jurisdictional grounds are likely to end up in the Federal Circuit. Opp. 14 (quoting Pet. 17). Thus, the Government stresses that the MSPB directs claimants in such cases to "seek judicial review in the Federal Circuit," and "where an employee mistakenly files in the wrong court, that court will have the ability to transfer the case" to the Federal Circuit. *Id.* The Government thereby underscores petitioner's point that the ordinary process of percolation that tends to give rise to circuit

conflicts will not operate here because these cases are being routed to the Federal Circuit.

Nor is it any answer for the Government to say that "the claimant could seek review of the question presented in this Court following a final decision from the Federal Circuit." Opp. 16. The Federal Circuit has squarely addressed the precise issue presented here, *see Conforto*, 713 F.3d at 1115-21, and there is no reason to suppose that it will reverse course. Accordingly, if a claimant sought this Court's review of a future Federal Circuit decision applying the *Conforto* rule, the Government can be expected to oppose review there for the same reasons that it opposes review here.

And the brief in opposition fails to provide any principled basis for distinguishing "procedural" from "jurisdictional" MSPB dismissals. If, as the Government asserted in *Kloeckner*, that distinction is "difficult and unpredictable" to apply, and "make[s] little sense," that is as true today as five years ago. *Kloeckner* Opp. at 15, 2011 WL 6281813, at *15 (internal quotation omitted); *Kloeckner* Resp. Br. at 25 n.3, 2012 WL 2883261, at *25 n.3. If the Government cannot articulate a principled distinction between "procedural" and "jurisdictional" dismissals, it is unrealistic and unfair to expect claimants, many if not most of whom proceed *pro se*, to apply any such distinction to determine where to seek judicial review of adverse MSPB decisions. *See, e.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) ("[T]he distinction between jurisdictional conditions and claim-processing rules can be confusing in practice."); *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 799 (1985) (noting

the "bizarre jurisdictional patchwork" that would result if the forum for judicial review of Board decisions turned on "whether an employee's retirement was voluntary or involuntary, and accordingly ... whether the appeal might properly be characterized as an adverse action"); *Conforto*, 713 F.3d at 1124-25 (Dyk, J. dissenting).

At bottom, the Government cannot deny that this case presents a unique vehicle for this Court to address this issue: petitioner mistakenly filed this case in the D.C. Circuit, instead of either the Federal Circuit or a district court, and that court appointed counsel to address the jurisdictional issue rather than summarily dismissing or transferring the case. The legal arguments on both sides have been extensively fleshed out, and there is no reason to delay review.

To the contrary, there is every reason for this Court to resolve this recurring issue for once and for all. The Federal Government is the Nation's largest employer, so the question "whether the United States Court of Appeals for the Federal Circuit" or a "United States district court" has jurisdiction to review MSPB decisions involving discrimination claims is of "substantial importance." *Lindahl*, 470 U.S. at 771; *see also Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2135 (2012) (emphasizing the need for "clear guidance about the proper forum for the employee's claims at the outset of the case"). Unless and until this Court grants review, the Federal Circuit has effectively deprived federal employees of their right to *de novo* review of discrimination claims in federal district court, and

turned the bifurcated system of judicial review established by Congress on its head.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

December 20, 2016

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 27 2017
OFFICE OF THE CLERK

No. 16-399

IN THE
Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
SEPTEMBER 27, 2016
CERTIORARI GRANTED JANUARY 13, 2017

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General Docket
United States Court of Appeals for
District of Columbia Circuit

Court of Appeals Docket #: 14-1155
Anthony Perry v. MSPB
Appeal From: Merits Systems Protection Board
Fee Status: Fee Paid

Docketed: 08/20/2014
Termed: 07/22/2016

Case Type Information:
1) Petition for Review
2) Review
3)

Originating Court Information:
District: MSPB-1 : MSPB-DC-0752-12-0486-B-1

District: MSPB-1 : MSPB-DC-0752-12-0487-B-1

Prior Cases:
None

Current Cases:
None

Panel Assignment:
Panel: TBG SS PAM
Date of Hearing: 11/18/2015 **Date of Decision:** 07/22/2016 **Date Completed:** 07/22/2016

Anthony W. Perry	Petitioner	Anthony W. Perry [NTC Pro Se] Firm: 301-928-2305 5907 Croom Station Road Upper Marlboro, MD 20772
v.		

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Anthony W. Perry, Petitioner v. Merit Systems Protection Board, Respondent --- Rebecca Liane Taibleson, Appointed Amicus Curiae for Petitioner

08/20/2014	☒	PETITION FOR REVIEW CASE docketed. [14-1155]
08/21/2014	☒ ▩ 87 pg, 5.44 MB	PETITION FOR REVIEW filed [1508610] by Anthony W. Perry of a decision by federal agency [Service Date: 08/21/2014] Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing. [14-1155]
08/21/2014	☒ ▩ 1 pg, 39.13 KB	CERTIFIED COPY [1508679] of Petition for Review sent to respondent [1508610-2] [14-1155]
08/21/2014	☒ ▩ 8 pg, 625.03 KB	CLERK'S ORDER filed [1508682] directing party

		to file payment of docketing fee PETITIONER payment of docketing fee due 09/22/2014; directing party to file motion to proceed on appeal in forma pauperis. PETITIONER motion to proceed IFP in this court due 09/22/2014; to show cause regarding petition for review [1508610-2]. Response to Order due 09/22/2014. Response may not exceed 20 pages, Failure to respond shall result in dismissal of the case for lack of prosecution; The Clerk is directed to mail this order to petitioner by certified mail, return receipt requested and by 1st class mail. [14-1155]
08/21/2014	X	FIRST CLASS MAIL SENT [1508686] of order [1508682-2] to petitioner [14-1155]
08/21/2014	X	CERTIFIED MAIL SENT [1508688] with return receipt requested [Receipt No.70070710000047191853

		0] of order [1508682-2]. Certified Mail Receipt due 09/22/2014 from Anthony W. Perry. [14-1155]
08/29/2014	[X] 1 pg, 126.64 KB	CERTIFIED MAIL RECEIPT [1510238] RECEIVED from Anthony Perry [signed for on 08/28/2014] for order [1508688-2] sent to Petitioner Anthony W. Perry [14-1155]
09/18/2014	[X]	NOTICE FILED [1513578] by Anthony W. Perry for payment of docketing fee. [Case Number 14-1155: Fee Paid] [Service Date: 09/18/2014] [14-1155]
09/18/2014	[X] 13 pg, 409.63 KB	RESPONSE FILED [1513632] by Anthony W. Perry to order to show cause [1508682-2] combined with a MOTION FILED by Anthony W. Perry to vacate (Response to Motion served by mail due on 10/06/2014) [Service Date: 09/23/2014 by Clerk] Pages: 11-15. [14-1155]--[Edited 09/23/2014 by LMF]

10/02/2014	✕ 1 pg, 390.59 KB	ENTRY OF APPEARANCE filed [1515059] by Jeffrey Gauger and co-counsel Stephen Fung Bryan Polisuk on behalf of Respondent MSPB. [14-1155] (Gauger, Jeffrey)
10/02/2014	✕ 31 pg, 1.78 MB	REPLY FILED [1515146] by MSPB to Response and RESPONSE FILED to Cross Motion [1513632-3] (Reply to Response by Mail to Cross Motion due on 10/14/2014) [Service Date: 10/02/2014 by US Mail, CM/ECF NDA] Pages: 1-10. [14-1155] (Gauger, Jeffrey)
10/08/2014	✕ 53 pg, 7.86 MB	REPLY FILED [1516315] by Anthony W. Perry to response [1515146-2] styled as "Reply to Response to Petitioners Response to Order to Show Cause and Response to Petitioners Motions to Void Orders and Judgments". [Service Date: 10/09/2014 by CM/ECF NDA] Pages: 1-10. [14-1155]

12/05/2014	[X] 43 pg, 2.05 MB	SUPPLEMENT [1526466] to response [1513632-2] filed by Anthony W. Perry [Service Date: 12/05/2014] [14-1155]
12/18/2014	[X] 2 pg, 43.4 KB	PER CURIAM ORDER filed [1528135] discharging Clerk order of docketing fee payment [1508682-2], directing the parties, while not otherwise limited, address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. 7703(b)(1)(B); and (2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2); appointing amicus curiae Rebecca Liane Taibleson; referring motion to vacate [1513632-3] to the merits panel to which this case is assigned. Before Judges: Henderson, Srinivasan and Millett. [14-1155]
12/23/2014	[X] 3 pg, 87.17 KB	CLERK'S ORDER filed [1528905] setting briefing schedule: PETITIONER

		Brief due 02/13/2015. APPENDIX due 02/13/2015. AMICUS FOR PETITIONER Brief due 02/13/2015. RESPONDENT Brief due on 03/16/2015. PETITIONER Reply Brief due 03/30/2015. AMICUS FOR PETITIONER Reply Brief due 03/30/2015 [14-1155]
12/23/2014	☒	CERTIFIED MAIL SENT [1528914] with return receipt requested [Receipt No.7007 0710 0004 7195 9991] of briefing order [1528905-3]. Certified Mail Receipt due 01/22/2015 from Anthony W. Perry. [14-1155]
12/23/2014	☒	FIRST CLASS MAIL SENT [1528915] of briefing order [1528905-3] to petitioner [14-1155]
12/30/2014	☒ 1 pg, 95.68 KB	CERTIFIED MAIL RECEIPT [1531396] RECEIVED from Anthony Perry [signed for on 12/29/2014] for order [1528914-2] sent to Petitioner Anthony W. Perry [14-1155]

01/05/2015	[X] 1 pg, 36.43 KB	NOTICE FILED [1531387] by Anthony W. Perry to join in brief of amicus curiae [Service Date: 01/02/2015] [14-1155]
02/13/2015	[X] 61 pg, 317.06 KB	AMICUS FOR PETITIONER BRIEF [1537552] filed by Ms. Rebecca Liane Taibleson [Service Date: 02/13/2015] Length of Brief: 9,998 words. [14-1155] (Taibleson, Rebecca)
02/13/2015	[X] 596 pg, 33.6 MB	*JOINT* APPENDIX [1537564] filed by Ms. Rebecca Liane Taibleson and Anthony W. Perry. [Volumes: 1] [Service Date: 02/13/2015] [14-1155] (Taibleson, Rebecca)
02/19/2015	[X] 12 pg, 414.65 KB	CERTIFIED INDEX TO RECORD [1538388] filed by MSPB [Service Date: 02/19/2015] [14-1155] (Fung, Stephen)
03/16/2015	[X] 4 pg, 83.21 KB	UNOPPOSED MOTION filed [1542463] by MSPB for leave to file appendix [Service Date: 03/16/2015] Pages: 1-10. [14-1155] (Fung, Stephen)

03/16/2015	[X] 71 pg, 1.49 MB	MODIFIED EVENT FROM FILED TO LODGED--SUPPLEMENTAL APPENDIX [1542466] filed by MSPB. [Volumes: 1] [Service Date: 03/16/2015] [14-1155]--[Edited 03/18/2015 by LMF] (Fung, Stephen)
03/16/2015	[X] 58 pg, 559.96 KB	RESPONDENT BRIEF [1542614] filed by MSPB [Service Date: 03/16/2015] Length of Brief: 8700 words. [14-1155] (Fung, Stephen)
03/19/2015	[X] 1 pg, 38.15 KB	CLERK'S ORDER filed [1543230] granting motion for leave to file [1542463-2]; the Clerk is directed to file supplemental appendix [1542466-2] [14-1155]
03/19/2015	[X]	PER ABOVE ORDER lodged appendix [1542466-2] is filed [14-1155]
03/30/2015	[X] 37 pg, 217.08 KB	AMICUS FOR PETITIONER REPLY BRIEF [1544921] filed by Ms. Rebecca Liane Taibleson [Service Date: 03/30/2015] Length of

		Brief: 5,852 words. [14-1155] (Taibleson, Rebecca)
09/04/2015	[X] 1 pg, 41.17 KB	CLERK'S ORDER [1571543] filed scheduling oral argument on Wednesday, 11/18/2015. [14-1155]
10/08/2015	[X] 27 pg, 1.27 MB	PETITIONER BRIEF [1578991] filed by Anthony W. Perry [Service Date: 10/07/2015] [14-1155]
10/26/2015	[X]	FORM 72 [1579934] submitted by amicus for appellant [Service Date: 10/26/2015] [14-1155]--[Edited 10/26/2015 by LMF] (Taibleson, Rebecca)
10/27/2015	[X]	FORM 72 submitted by arguing attorney, Stephen W. Fung, on behalf of Respondent MSPB *(For Internal Use Only: Form is restricted to protect counsel's personal contact information).* [14-1155] (Fung, Stephen)
11/04/2015	[X] 1 pg, 41.79 KB	PER CURIAM ORDER [1581893] filed allocating oral argument time as follows: Appointed Amicus Curiae Petitioner - 10

		Minutes, Respondent - 10 Minutes. One counsel per side to argue; directing party to file Form 72 notice of arguing attorney by 11/12/2015 [14-1155]
11/05/2015	☒	FORM 72 submitted by arguing attorney, Stephen Fung, on behalf of Respondent MSPB *(For Internal Use Only: Form is restricted to protect counsel's personal contact information).* [14-1155] (Fung, Stephen)
11/05/2015	☒	FORM 72 submitted by arguing attorney, Rebecca Tiableson, on behalf of Appointed Amicus Curiae for Petitioner Ms. Rebecca Liane Taibleson *(For Internal Use Only: Form is restricted to protect counsel's personal contact information).* [14-1155] (Taibleson, Rebecca)
11/18/2015	☒ 1 pg, 39.78 KB	ORAL ARGUMENT HELD before Judges Griffith, Srinivasan and Millett. [14-1155]
12/11/2015	☒	TRANSCRIPT [1588205] of oral argument [14-1155]

03/30/2016	[X] 2 pg, 79.19 KB	NOTICE [1606371] filed by Ms. Rebecca Liane Taibleson to withdraw attorney Rebecca Liane Taibleson who represented Rebecca Liane Taibleson in 14-1155 [Service Date: 03/30/2016] [14-1155] (Taibleson, Rebecca)
07/22/2016	[X] 1 pg, 53.55 KB	PER CURIAM JUDGMENT [1626350] filed that the petition for review be transferred to the Federal Circuit, for the reasons in the accompanying opinion. The Clerk is directed to electronically transmit the original file and a certified copy of this judgment to the U.S. Court of Appeals for the Federal Circuit. Before Judges: Griffith, Srinivasan and Millett. [14-1155]
07/22/2016	[X] 14 pg, 64.67 KB	OPINION [1626356] filed (Pages: 14) for the Court by Judge Srinivasan. [14-1155]
07/22/2016	[X] 1140 pg, 57.57 MB	LETTER [1626364] sent to transfer case to the USCA Federal Circuit. Documents Sent: Clerk's

		File and copy of judgment transferring case. [14-1155]
07/25/2016	☒	NOTICE [1627505] filed by case received and given CAFC case No. 16-2377. [Service Date: 07/22/2016] [14-1155]
09/27/2016	☒ 1 pg, 53.33 KB	LETTER [1638483] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 09/27/2016 as No. 16-399. [14-1155]
01/13/2017	☒ 1 pg, 62.8 KB	LETTER [1656225] received from the Clerk of the Supreme Court of the United States notifying this court of the following activity in case No. 16-399: The petition for writ of certiorari was granted on 01/13/2017. [14-1155]

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DC-0752-12-0487-B-1

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6	Ojection To Agency Motion To Strike Response	Appellant	10/15/2012
5	Motion to Strike Appellant's Reply to Agency's Response to Petition for Review	Agency	10/10/2012
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26	Summary of Status/Close of Record Conference	MSPB	6/26/2012
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23	Second Response to Agency Response File	Appellant	6/7/2012

22	Request to Compel May Discovery Request	Appellant	6/5/2012
21	Opposition to Removing Documents from File	Appellant	6/5/2012
20	Response to Hearing Clarification	Appellant	6/4/2012
19	Agency's Witness List	Agency	6/4/2012
18	Response to Agency File	Appellant	6/1/2012
17	Response to Close of Record Conference	Appellant	6/1/2012
16	Agency Response to Jurisdictional Order	Agency	5/29/2012
15	Agency Respnose File	Agency	5/21/2012
14	Response to Order on Jurisdication	Appellant	5/17/2012
13	Motion to Stay Filing of Agency Response and Discovery	Agency	5/11/2012
12	Removal Decision	Agency	5/10/2012
11	Letter of Proposed Removal	Agency	5/9/2012
10	Agency Representative Addition	Agency	5/9/2012
9	Correspondence RE: EEOC	Appellant	5/7/2012
8	Response to Specifications	Appellant	5/7/2012
7	Jurisdiction Order	MSPB	5/7/2012
6	Close of Record Conference	MSPB	5/7/2012
5	EEOC Document Re: Settlement Discussion	Appellant	5/3/2012
4	Waiver Rights to a Hearing	Appellant	5/3/2012
3	Acknowledgment Order	MSPB	4/30/2012
2	Supporting Documents	Appellant	4/27/2012
1	Initial Appeal	Appellant	4/25/2012

MSPB Dockets
ANTHONY W. PERRY v. DEPARTMENT OF COMMERCE
DC-0752-12-0486-B-1

Tab	Doc Info.	Submitted by	Date Issued/ Received
	Petition for Review		
20	Certificate of Service	MSPB	8/6/2014
19	Final Order	MSPB	8/6/2014
18	Letter Acknowledging Motion	MSPB	7/23/2014
17	Motion For Leave To File New Material and Relevant	Appellant	7/23/2014
16	Agency Representative Addition	Agency	5/9/2014
15	Response to Agency Opposition to PFR	Appellant	3/1/2014
14	Opposition to Appellant's Petition for Review	Agency	2/21/2014
13	Petition For Review Acknowledgment Letter	MSPB	1/28/2014
12	Petition For Review With Redactions	Appellant	1/27/2014
11	Agency Representative Addition	Agency	1/27/2014
10	Order Denying Request to Exceed PFR Page Limit	MSPB	1/23/2014
9	Request Leave to Exceed Page Limit	Appellant	1/23/2014
8	Response to Appellant's Request to Supplement the Record	Agency	1/22/2014
7	Request to Supplement the Record	Appellant	1/16/2014
6	Letter Rescinding Petition for Review	MSPB	1/8/2014
5	Intent Letter	Appellant	1/8/2014

4	Continuation of Response to PFR	Appellant	1/8/2014
3	Response to Petition for Review Dated December 26, 2013 dated 1/2/2014	Appellant	1/8/2014
2	Petition For Review Acknowledgment Letter	MSPB	1/7/2016
1	Petition For Review	Appellant	1/2/2014
	Initial Appeal		
31	Petition for Review (Pacer Copy) filed on 8/20/2014	Petitioner	9/2/2014
30	Request	Appellant	12/30/2013
29	Certificate of Service	MSPB	12/23/2013
28	Initial Decision	MSPB	12/23/2013
27	Request For An Immediate Decision on the Merits	Appellant	11/26/2013
26	Hearing CD 8/07/13	Other	8/23/2013
25	Order and Summary of Prehearing Conference	MSPB	8/6/2013
24	Untimely Objection to Appellant Exhibits	Appellant	8/5/2013
23	Agency's Objections to Appellant's Proposed Exhibits	Agency	8/5/2013
22	Witness List Attachment Resubmission Due To Failure to Attach	Appellant	8/3/2013
21	Agency's Prehearing Submission	Agency	8/1/2013
20	List of Facts and Issues	Appellant	7/29/2013
19	Appellant Witness List	Appellant	7/23/2013
18	Response to Agency Opposition to Motion For SF-50 and SF-52	Appellant	7/23/2013
17	Opposition to Motion for Discovery of SF-50 and SF-52	Agency	7/22/2013

16	Motion To Compel the Agency to Respond To Pending Motions for Discovery	Appellant	7/15/2013
15	Motion To AJ For Document Titles and Reason Returned	Appellant	7/15/2013
14	Motion For Discovery of SF-50 and SF-52	Appellant	7/11/2013
13	Exhibits E and F	Appellant	7/8/2013
12	Objection To Agency Motion To Strike	Appellant	7/8/2013
11	Motion to Strike	Agency	7/5/2013
10	Clarification of Agency's Request	Appellant	7/3/2013
9	Supervisor Code, Work Performance and Responsibilities	Appellant	7/3/2013
8	Discovery of Deciding Official's Notes, Communications, Correspondence and	Appellant	7/3/2013
7	Objection To Agency's Motion to Conduct Discovery and to Extend Hearing Date	Appellant	7/1/2013
6	Motion to Conduct Discovery and Extend Hearing Date	Agency	6/27/2013
5	Motion to Conduct Discovery and to Extend Hearing Date by 7 Days	Agency	6/27/2013
4	John Does v. Dept. of Commerce/EEOC Guidance and Relevant Docs	Appellant	6/28/2013
3	Hearing Order	MSPB	6/19/2013
2	Acknowledgment Order	MSPB	6/19/2013

1	Board Ordered Remand	MSPB	6/12/2013

MSPB Dockets

ANTHONY W. PERRY v. DEPARTMENT OF COMMERCE
DC-0752-12-0486-I-1

Tab	Doc Info.	Submitted by	Date Issued/ Received
	Petition for Review		
9	Remand Order	MSPB	6/12/2013
	Certificate of Service	MSPB	6/12/2013
8	Letter Rejecting Pleading	MSPB	3/5/2013
7	Objection To Agency Motion To Strike Response	Appellant	10/15/2012
6	Motion to Strike Appellant's Reply to Agency's Response to Petition for Review	Agency	10/10/2012
5	Response To Agency Response to Petition For Review	Appellant	9/26/2012
4	Response to Petition for Review	Agency	9/20/2012
3	Response to Petition for Review Acknowledgment Order dated 9/7/2012	Appellant	9/9/2012
2	Petition For Review Acknowledgment Letter	MSPB	9/7/2012
1	Petition for Review	Appellant	9/6/2012
	Initial Appeal		
29	Motion to Stay Filing of Agency Response and Discovery	Appellant	5/11/2012

28	Initial Decision	MSPB	7/30/2012
	Certificate of Service	MSPB	7/30/2012
27	Motion to Supplement the close of Record Conference Summary	Appellant	7/3/2012
26	Summary of Status Conference	MSPB	6/26/2012
25	Response to Agency's 6/15 Opposition to Motions	Appellant	6/19/2012
24	Response to Motions	Agency	6/15/2012
23	Second Response to Agency Response File	Appellant	6/7/2012
22	Request to Compel May Discovery Request	Appellant	6/5/2012
21	Opposition to the Removal of Documents from File	Appellant	6/5/2012
20	Response to Hearing Clarification	Appellant	6/4/2012
19	Agency's Witness List	Agency	6/4/2012
18	Response to Agency's File	Appellant	6/1/2012
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16	Agency Response to Jurisdictional Order	Agency	5/29/2012
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1	Initial Appeal	Appellant	4/25/2012

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Anthony W. Perry,
Complainant,

v.

Gary Locke, Secretary,
U.S. Department of Commerce
Agency.

EEOC Case No. 531-2010-00351X
Agency Complaint Nos. 09-63-01027, 10-63-00197 & 11-63-00080

EEOC Docket No. 0120111784
Agency Complaint Nos. 07-63-00080 & 07-63-00145

EEOC Docket No. 0120111034
Agency Complaint No. 10-63-02671

SETTLEMENT AGREEMENT

1. **PARTIES.** The parties, Anthony W. Perry (Complainant) and the U.S. Department of Commerce (Agency), through the undersigned, voluntarily enter into this Settlement Agreement (Agreement), to resolve all existing matters concerning Complainant's employment with the Agency, including the issues raised in EEOC Case No. 531-2010-00351X / Agency Complaint Nos. 09-63-01027, 10-63-00197 & 11-63-00080 and any outstanding appeal rights stemming from EEOC Docket No. 0120111784 / Agency Complaint Nos. 07-63-00080 & 07-63-00145 and EEOC Docket No. 0120111034 / Agency Complaint No. 10-63-02671. By this Agreement, the parties resolve all disputes between them concerning Complainant's

employment with the Agency, regardless of the forum, in existence on the effective date of this Agreement.

2. COMPLAINANT. In consideration of the Agency taking the actions described in Paragraph 3 below, Complainant agrees to:

a. Retire voluntarily effective no later than September 4, 2012. Complainant acknowledges that by entering into this Agreement his decision to retire is both voluntary and irrevocable.

b. Voluntarily resign from his employment with the Agency, effective September 4, 2012, in the event Complainant has not retired by the close of business, September 4, 2012. Complainant will do this by completing Part E of the Standard Form 52 attached to this Agreement and submitting this completed form to the Agency at the same time that he submits this Agreement with his signature. Complainant agrees that the reason given for his resignation will not be adverse or hostile to the Agency.

c. Except as set forth in this Agreement, not apply for or accept any positions with the Agency at any time in the future from the effective date of this Agreement. If Complainant applies for employment in violation of the Agreement and the Agency hires him, the Agency, at its discretion, may remove him immediately. Complainant further agrees to voluntarily waive all appeal rights he has and not to litigate in any forum, judicial or administrative, any claims arising from a removal pursuant to this paragraph.

d. Refrain from engaging in any acts of misconduct from the effective date of this Agreement until his retirement or resignation, which will be no later than September 4, 2012. If the Agency determines in its sole discretion that Complainant has engaged in any acts of misconduct during the time period established in this paragraph, Complainant will be subject to immediate removal without any right to reply. The waiver of rights contained in Paragraph 2.h. below applies to any removal implemented pursuant to this paragraph.

e. Serve a suspension for thirty (30) calendar days in lieu of the removal proposed on June 7, 2011, for receipt of pay for time not worked and failure to follow supervisory directive. The suspension will be served nine (9) consecutive calendar days per pay period between Saturday of the preceding week and Sunday of the following week, beginning Saturday, August 27, 2011.

f. Accept, at the Agency's sole discretion, a reassignment from the effective date of this Agreement until his retirement or resignation, which will be no later than September 4, 2012. Complainant agrees and understands that he will be reassigned to the position of Information Technology Specialist, GS-14, with no supervisory title, status or duties. There will be no change to Complainant's salary and/or benefits as a result of this reassignment. The Agency retains the right to change Complainant's supervisor or work unit at its sole discretion.

g. **WITHDRAWAL.** Withdraw EEOC Case No. 531-2010-00351X / Agency Complaint Nos. 09-63-01027, 10-63-00197 & 11-63-00080, EEOC Docket No. 0120111784 / Agency Complaint Nos. 07-63-00080 & 07-63-00145, and EEOC. Docket No. 0120111034 / Agency Case No. 10-63-02671 with no right to raise these issues again, except as provided in Paragraph 7, below. These withdrawals will take effect on the effective date of this Agreement.

h. **WAIVER.** Waive, release, and forever discharge the Agency, its officers, agents, employees, and representatives (in their official and/or personal capacities) from any claims, demands, or causes of action, which Complainant has or may have, arising from his employment, including issues raised in EEOC Case No. 531-2010-00351X / Agency Complaint Nos. 09-63-01027, 10-63-00197 & 11-63-00080, EEOC Docket No. 0120111784 / Agency Nos. 07-63-00080 & 07-63-00145, and EEOC Docket No. 0120111034 / Agency Case No. 10-63-02671. Complainant specifically waives any and all rights and claims arising out of the issues raised in the above-cited formal complaints of discrimination and/or related to any action taken pursuant to any provision of Paragraph 2, above, and Paragraph 3, below. Complainant waives any and all rights and claims arising from Complainant's employment under the Age Discrimination in Employment Act, 29 U.S.C. § 633a *et seq.*, as amended by the Older Workers' Benefit Protection Act, the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*, as amended, and/or Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, as

amended, as applicable. This release includes but is not limited to a release of any right to administrative, judicial, or congressional relief, or any other type of relief, or of any claim to back pay, attorneys' fees and costs, or other type of compensation, except what is specifically set forth in paragraph 3, below. However, by entering into this Agreement, Complainant does not waive rights or claims that may arise after the effective date of the Agreement.

3. AGENCY. In consideration of Complainant taking the actions described in Paragraph 2, above, the Agency agrees to:

a. Not remove Complainant from his position or from the Federal service based upon the charges outlined in the June 7, 2011, proposal to remove letter.

b. Issue a decision on the proposal to remove letter issued on June 7, 2011, suspending Complainant for thirty (30) days. The suspension will be served nine (9) consecutive calendar days per pay period between Saturday of the preceding week and Sunday of the following week, beginning Saturday, August 27, 2011. Complainant understands that the wording of the letter suspending him is within the sole and exclusive discretion of the Agency.

c. At the Agency's sole discretion, reassign Complainant from the effective date of this Agreement until his retirement or resignation, which will be no later than September 4, 2012. Complainant agrees and understands that he will be reassigned to the position of Information Technology Specialist, GS-14, with no

supervisory title, status or duties. There will be no change to Complainant's salary and/or benefits as a result of this reassignment. The Agency retains the right to change Complainant's supervisor or work unit at its sole discretion.

d. Process Complainant's voluntary resignation effective September 4, 2012, in the event Complainant has not retired by the close of business, September 4, 2012.

e. Expunge Complainant's Official Personnel Folder of all records of disciplinary action taken pursuant to Paragraph 3.b. above if as of the date of his retirement or resignation, which will be no later than September 4, 2012, Complainant has not engaged in any further acts of misconduct, in accordance with Paragraph 2.d. above. Pursuant to this subparagraph, the Agency agrees to provide any prospective employer with a reference consisting of the dates of Complainant's employment with the Agency; the title, grade, series, and salary of the position held by Complainant at the time of his retirement or resignation; and that Complainant retired or resigned voluntarily from his position with the Agency. However, failure to comply with this subparagraph due to ignorance of the Agreement and its terms by any Agency employee does not give rise to a claim of breach of contract by Complainant.

4. **NON-ADMISSION.** This Agreement does not constitute an admission by the Agency of any wrongdoing on its part, and the Agency expressly denies that it, its officers, agents, employees, or

representatives, violated any law, regulation, contract, or employment practice with regard to the treatment of Complainant, or that it discriminated, harassed and/or retaliated against Complainant in any way. Similarly, this Agreement does not mean that Complainant's allegations are without merit. Rather, the Agreement reflects the parties' interest in reaching an agreement to the satisfaction of both parties.

5. **NOT PRECEDENTIAL.** The parties agree that this Agreement has no precedential effect. Neither the Agreement, nor any term(s) herein may be used as a basis, by any person(s), to justify similar terms in any subsequent matter. This Agreement shall not be used, cited, or relied upon by any party in connection with any other judicial or administrative procedure.

6. **NON-DISCLOSURE.** The parties agree to keep the nature and terms of this Agreement confidential. The terms of the Agreement may not be disclosed to any person or entity beyond the persons signing below, except to Complainant's spouse as applicable, as required by law, as necessary to implement the terms of the Agreement, or as ordered by a court or administrative body of competent jurisdiction.

7. **BREACH OF AGREEMENT.** If either party believes that the other party has failed to comply with the terms of the Agreement, the party shall notify Roy Castro, EEO Officer, U.S. Department of Commerce, or Suzan J. Aramaki, Director, Office of Civil Rights, U.S. Department of Commerce, in writing, of the alleged noncompliance within thirty (30) days of when the party knew or should have known of the alleged noncompliance. Pursuant to 29 C.F.R. § 1614.504(c), allegations that subsequent acts of harassment,

discrimination and/or retaliation violate this Agreement shall be processed as separate complaints.

In accordance with 29 C.F.R. § 1614.504(a), in the event of failure by the Agency to carry out the terms of this Agreement for any reason other than for noncompliance or waiver of this Agreement by Complainant, Complainant may request:

a. Implementation of the terms of the Agreement; or

b. Reinstatement of the formal complaint(s) for further processing.

8. EFFECT OF SIGNATURE. By signing this Agreement, Complainant agrees that Complainant has read and understands the entire Agreement, the effect(s) of each provision, especially the provisions relating to the withdrawal of the formal complaint(s), thereby foreclosing further litigation on the matters raised in the formal complaint(s), and the waiver set forth in Paragraph 2, above, and that Complainant has signed this Agreement voluntarily and was in no way coerced. Complainant shall have twenty-one (21) days from the date of receipt of this Agreement to consider its terms. Should Complainant sign this Agreement before the twenty-one (21) day time period has expired, Complainant attests that Complainant's decision to accept such a shortening of this period is knowing and voluntary, and was not induced by the Agency through fraud, misrepresentation, and/or threat to withdraw or alter the terms of the Agreement.

9. TOTALITY OF AGREEMENT. This Agreement constitutes a fair, full, and final resolution of all aspects of Complainant's allegations, and contains all terms and conditions of the Agreement

between the parties. No other conditions or assurances, expressed or implied, are included.

10. JOINT PRODUCT. This Agreement is a joint product and will not be construed against any party on the grounds of sole authorship.

11. EFFECTIVE DATE. This Agreement becomes effective when fully executed by the signatories designated below to include all concurrences.

/s/ Anthony W. Perry *08/16/2011*
ANTHONY W. PERRY Date
Complainant

/s/ Brian E. McGrath *08/16/2011*
BRIAN E. MCGRATH Date
Management Official

/s/ Johnny T. Zuagar *08/16/2011*
JOHNNY T. ZUAGAR Date
Complainant's Representative

/s/Ronda J. Brown *08/22/2011*
RONDA J. BROWN Date
Management's Representative

CONCURRENCES:

/s/ Roy Castro *08/22/2011*
ROY CASTRO Date
Equal Employment Opportunity Officer

/s/ Ted A. Johnson *08/11/2011*
TED A. JOHNSON Date
Acting Chief, Human Resources Division

/s/ Brian D. DiGiacomo *08/22/2011*
BRIAN D. DiGIACOMO Date
Chief, Employment and Labor Law Division

Typed Version
Anthony W Perry

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

August 26, 2011

MEMORANDUM FOR Anthony W. Perry
Information Technology Specialist
Business Planning Staff
Lan Technology Support Office

From: Terryne F. Murph
Chief, Information Systems Support and Review Office

Subject: Proposed Removal Decision

By letter dated June 7, 2011, Daren J. Gutschow, Assistant Division Chief, Telecommunications Office, U.S. Census Bureau, informed you that he proposed to remove you from your position as an Information Technology (IT) Specialist, GS-2210-14/08, with the Business Planning Staff, Lan Technology Support Office, and from the Federal service, no earlier than 30 calendar days after your receipt of the proposal notice, for inappropriate conduct.

In the proposal notice dated June 7, 2011, you were informed of your right to reply to the proposal notice orally, in writing, or both. You requested an extension to the reply period, which was granted until close of business July 1, 2011. On June 15, 2011, you stopped by my office for an impromptu meeting. On June 16, 2011, a formal meeting was held with you and your former designated representative, Franklin D. Silberstein, during which you provided an oral response. On June 30, 2011, I received a written reply from you and your newly designated representative, Johnny T. Zuagar.

After full consideration of the information available to me, including your oral and written responses, I find that the reason for the proposed removal is fully supported by the evidence. However, I have determined that a lesser penalty will deter such misconduct in the future and should be imposed. Accordingly, I have decided to suspend you for a period of thirty (30) calendar days from your position and the Federal service.

Specifically, you will serve your suspension intermittently to lessen the burden that this suspension would have on you financially. Your suspension will be served:

- effective Saturday, August 27, 2011, not to exceed Sunday, September 4, 2011, and you will return to you regular duty status on Monday, September 5, 2011.
- effective Saturday, September 10, 2011, not to exceed Sunday, September 18, 2011, and you will return to you regular duty status on Monday, September 19, 2011.

Fax
Attach 0 1 2 P1

Appeal Number 2011-20
Anthony W Barry

- effective Saturday, September 24, 2011, not to exceed Wednesday, October 5, 2011, and you will return to you regular duty status on Thursday, October 6, 2011.

This action is being taken pursuant to Title 5, Code of Federal Regulations, Part 752, to promote the efficiency of the service.

If you have any questions about the contents of this decision notice, or your rights in connection with it, you may contact S[illegible]y J. Chalmers, Chief, Employee Relations Branch on (301) 763-1463.

Tab Attach 01-P2

APPLICATION FOR VOLUNTARY EARLY RETIREMENT AND/OR VOLUNTARY SEPARATION INCENTIVE PROGRAM

PRINCIPAL PURPOSE: This form serves as a Census Bureau employee application for Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Pay (VSIP). This application specifies how the employees would separate and explains the procedures for approving VERA and VSIP.

1. NAME (Last, First, Middle Initial)	2. SSN
Perry Anthony W.	[redacted]
3. ORGANIZATION	**4. OFFICE TELEPHONE NUMBER**
Information System Support and Review Office ISSRO	(301) 763-5058
5. JOB TITLE	**6. SERIES** / **7. GRADE**
Information Technology Specialist	2210 / GS-14/8

8. As part of the Census Bureau Voluntary Early Retirement Authority (VERA) and/or Voluntary Separation Incentive Payment (VSIP) programs, I am applying for separation under the following condition(s) (mark applicable conditions):

☒ VOLUNTARY EARLY RETIREMENT OR ☐ OPTIONAL RETIREMENT AND ☒ VSIP

9. When/if my VSIP application is approved, I shall be committed to a voluntary early or optional retirement and shall be entitled to receive a cash incentive equal to the lesser of: (1)$25,000, or (2) the amount that I would receive under the formula for computing severance pay. I understand that once approved, I may not withdraw my application on or after the effective date of my retirement.

I understand that by accepting the VSIP, I may not be reemployed anywhere within the Federal Government, including employment in non-appropriated fund instrumentalities or with an agency of the United States through a personal services contract or other direct contract for 5 years after my separation unless I repay the full amount of my separation incentive pay (before taxes and deductions).

I understand that by accepting early or optional retirement I am not subject to any restrictions regarding my annuity and I can accept non-Federal employment; except if I'm an employee covered under FERS that qualifies for the annuity supplement, I could have the supplement reduced or discontinued due to an earnings limitation. If an annuitant (i.e., a retired Federal employee) is hired under a Federal appointment, the annuity will continue and the new Federal salary will be offset by the annuity amount, unless the employing agency seeks and is granted a waiver of the salary offset by the U.S. Office of Personnel Management.

Statement of Understanding
By signing this document you are acknowledging you have read and understand the terms and conditions of this application.

a. EMPLOYEE SIGNATURE	b. DATE
Anthony W Perry	3/29/2012

HUMAN RESOURCES OFFICE USE ONLY

10. Approved by: Human Resources Specialist	Date Application Approved	Date Applicant Notified of Approval
	4/02/2012	4/02/2012

EXHIBIT 46

I Virginia 8:41 am 4/03/2012

Please type or print legibly. OMB No. 3124-0009

1. Name (last, first, middle initial)

Perry, Anthony, W.

2. Present Address (number and street, city, state, and zip code)

Address: [redacted]

City, State, Zip Code: [redacted]

3. Telephone numbers (include area code) and E-Mail Address

You must notify the Board in writing of any change in your telephone number(s) or e-mail address while your appeal is pending.

Home: [redacted] Work:

Fax: Other: [redacted]

E-mail Address: [redacted] Other Phone Type: Business

4. Do you wish to designate an individual or organization to represent you in this proceeding before the Board? (You may designate a representative at any time. However, the processing of your appeal will not normally be delayed because of any difficulty you may have in obtaining a representative.)

☐ Yes ☑ No

5. Name and address of the agency that made the decisions or took the action you are appealing (include bureau or division, street

Agency Name: Department of Commerce

Bureau: Bureau of the Census

Address: 4600 Silver Hill Road

City, State, Zip code: Washington, District of Columbia, 20233, United States of America

6. Your Federal employment status at the time of the decision or action you are appealing:

☐ Temporary ☑ Permanent ☐ Applicant

☐ Term ☐ Retired ☐ Seasonal

☐ None

7. Type of appointment (if applicable):

☑ Competitive ☐ SES ☐ Excepted

☐ Postal Service ☐ Other

8. Your occupational series, position title, grade, and duty station at the time of the decision or action you are appealing (if applicable):

Occupational Series: 2210 Position Title: Supervisory Information

Grade: GS-14 step 8 Duty Station: Suitland, MD

9. Are you entitled to veteran's preference? See 5 U.S.C. 2108.

☐ Yes ☑ No

10. Length of Government Service (if applicable):

28 Years 9 Months

11. Were you serving a probationary or trial period at the time of the decision or action you are appealing?

☐ Yes ☑ No

Appeal Number: 201201588

Submission Date: 4/25/2012 2:53:16 PM

Confirmation Number: 34193

Please type or print legibly.

HEARING: You may have a right to a hearing before an administrative judge. If you choose to have a hearing, the Board will notify you when and where it is to be held. If you do not want a hearing, the Board will make its decision on the basis of the submission of the parties.

12. Do you want a hearing? ☑ Yes ☐ No

E-Filing: Registration as an E-Filer enables you to file any or all of your pleadings with the Board in electronic form. Registration also means you consent to accept service of all pleadings filed by other registered E-Filers and all documents issued by the Board in electronic form. You will receive these as PDF documents at the e-mail address you provided the Board. If registered as an E-Filer, you may file any pleading, or portion of a pleading, by non-electronic means. You can withdraw your registration as an e-filer at any time.

13. Do you wish to register as an E-Filer in this appeal?

☑ I elect to E-File ☐ I decline to E-File

14. **I certify that all of the statements made in this form and all attached forms are true, complete, and correct to the best of my knowledge and belief.**

Anthony W. Perry, Appellant Date:

[redacted]

[redacted]

Please type or print legibly.

OMB No. 3124-0009

[redacted]

Name *(last, first, middle initial)* Perry, Anthony, W.

1. Check the box that best describes the personnel action or decision taken by the agency you named in MSPB Form 185-1 that you are appealing. (If you are appealing more than one action or decision, check each box applies.) Attach a copy of the decision letter (if any). If an SF-50 or its equivalent was issued and is available, attach it now; however, DO NOT delay filing your appeal because you do not have an SF-50. You may submit the SF-50 when it becomes available.

Termination of Employment (You may select only one of the following four personnel actions.)

- ☐ Removal (Termination after probationary or initial service period)
- ☐ Termination during probationary or initial service period
- ☐ Involuntary Resignation
- ☑ Involuntary Retirement

- ☐ Reduction in grade or pay
- ☑ Suspension for more than 14 days
- ☐ Separation, demotion, or furlough for more than 30 days by reduction in force (RIF)
- ☐ Furlough of 30 days or less
- ☐ Denial of within-grade increase
- ☐ Failure to restore/reemploy/reinstate or improper restoration/reemployment/reinstatement
- ☐ Negative suitability determination
- ☑ Other action Describe other action Supervisory status stripped; barred from

2. Date you received the agency's proposal letter (if any) (month, day, year)	3. Date you received the agency's final decision letter (if any) (month, day, year) (Attach a copy)	4. Effective date (if any) of the agency action or decision (month, day, year)
06/07/2011	08/22/2011	04/03/2012

5. Prior to filing this appeal, did you and the agency mutually agree in writing to try to resolve the matter through an alternative dispute resolution (ADR) process?

☐ Yes ☑ No

6. Explain briefly why you think the agency was wrong in taking this action or making this decision.

See Continuation Sheet for Response.

7. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

See Continuation Sheet for Response

Appeal Number: 201201588
Submission Date: 4/25/2012 2:53:16 PM
Confirmation Number: 34193

Please type or print legibly.

8. With respect to the agency personnel action or decision you are appealing, have you, or has anyone on your behalf, filed a grievance under a negotiated grievance procedure provided by a collective bargaining agreement?

☐ Yes ☑ No

9. If your answer to question 8 is "Yes," on what date was the grievance filed (month, day, year)?

NOT APPLICABLE

10. If your answer to question 8 was "Yes," has a decision on the grievance been issued?

NOT APPLICABLE

11. Select all the additional claims you would like to file with this appeal.

☐ No Additional Claims

☑ File a claim for harmful procedural error

☐ File a claim for not in accordance with law

☑ File a claim of prohibited discrimination

☑ File a claim of prohibited personnel practices

☐ File a Whistleblower claim

☐ Request a whistleblower stay

☐ File a USERRA claim

☐ File a veteran's preference claim

[redacted]

Continuation Sheet

6. Explain briefly why you think the agency was wrong in taking this action or making this decision.

1. I notified the Management Official in 2009 of my complaints of past discrimination, prior pending complaints (EEOC Case No. 531-2010-00351X (Agency Complaint Nos. 09-63-01027, 10-63-00197 & 11-63-00080; EEOC Docket No. 01201117784 (Agency Complaint Nos. 07-63-00080 & 07-63-00145; and EEOC Docket No 0120111034 (Agency Complaint No 10-63-02671)), and my desire to compete for promotional opportunities and move forward.
2. On May 19, 2011, I submitted "Opposition To Agency Summary Judgment to Dismiss" my claims of discrimination and prohibited personnel actions.
3. On June 6, 2011 I sent an email to the Census Bureau Director expressing my discontent about the continued discrimination against me and denial of opportunities given to younger Caucasian employees.
4. On June 7, 2011, I received a Proposed Removal from Darren J. Gutschow who was not my supervisor.
5. The Proposed Removal did not account for 30 minutes of legal break-time.
6. The Proposed Removal included overextended time taken during the lunch break when the practice condoned at the Census Bureau is one-hour for lunch breaks. My supervisor approved of a one-hour lunch break for all Branch employees.
7. The Proposed Removal did not consider my disability and the informal accommodations that had been provided by my supervisor since 2007. I was told by Dale Reed to "do what you have to do" to relieve and manage my pain from sitting to long or standing to long.
8. The Proposed Removal did not consider that I was allowed by my supervisor and Division Chief to work or make up time during the evening in the office, at home in the evening, and on my day off as needed without pay. There are at least two sets of emails regarding assignments I was working on to my supervisor, Division Chief and the management official after normal working hours.
9. Smokers are given unlimited time away from their desks for smoke breaks.
10. Employees using the fitness center are not tracked for the time away from their desks.
11. I attended all the meetings I was physically and emotionally able to attend.
12. My supervisor was always informed and aware of when I was going to be out of the office and the reason. There is no record of AWOL. Leave not recorded was unintentional.
13. My supervisor and my Division Chief approved and certified all of my Time and Attendance records.
14. The Proposed Removal indicated that the Deciding Official would provide me with a written decision. The Proposed Removal did not include an EEOC Settlement Agreement.
15. Over 300 hours of sick leave were used from 2009 through 2011 getting care for my disability and the remaining 50 or so hours for my daughter's healthcare needs with no impact on performance as I worked off the clock and my supervisors knew.
16. On February 27, 2012, I underwent a Total Left Hip Replacement of the disabled joint from which I had been suffering for years and more extensively over the last three years.
17. My first line supervisor, Dale Richard Reed and Division Chief, Patricia Musselman had both been named prior Responsible Management Officials.
18. A formal Reasonable Accommodations request was made June 13, 2011 (before the personnel actions and decisions being appealed were made.
19. A Reasonable Accommodations for my disability was granted on November 9, 2011.
20. The agency discriminated against me on the basis of race, age, and my disability and subjected me to retaliation and reprisal for prior EEOC activity. I was coerced to sign the EEOC Settlement Agreement forcing me to involuntary retire on September 4, 2012 (04/03/2012 because of continued surveillance and the agency statement it could terminate me at its discretion) and a 30-day suspension without a hearing on the basis of retaliation, prior EEO, and discrimination and in violation of the Douglass Factors and without just cause and due process.
21. I withdrew the Office of Special Counsel File # MA-11-2619 on Sept. 8.

[redacted]

Continuation Sheet

7. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

1. Reinstatement, reimbursement for 30-day suspension, back-pay, front-pay, benefits, all other allowable damages and relief. Agency officials punished who orchestrated this adverse action.
2. MSPB or EEOC hearing on the agency's intentional discrimination, prohibited personnel actions and retaliation charges. I am requesting all allowable damages to include actual and non-pecuniary compensatory, attorney fees and other equitable relief, retroactive promotion to GS-15, back-pay, front-pay, training that has been denied.

[redacted]

[redacted]

Please type or print legibly

OMB No. 3124-0009

Name *(last, first, middle initial)* Perry, Anthony, W.

Harmful Procedural Error -

Harmful error is defined in the Board's regulations as: "Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error." See 5 C.F.R.

1. If you believe that the agency made a error(or error) in applying required procedures in connection with the action or decision you

See Continuation Sheet for Response.

2. Explain how the error you in response to question 1 above caused the agency to reach a conclusion different from the one it would have

See Continuation Sheet for Response.

Not in Accordance with Law -

An appealable action will be reversed as being "not in accordance with the law" if the agency's action is unlawful in its entirety, i.e., if there is no legal authority for action.

3. If you believe that the agency action or decision you are appealing, was "not in accordance with law," please explain

NOT APPLICABLE

4. If you believe a specific law was violated, please identify the law and describe how the law you identified was violated.

NOT APPLICABLE

[redacted]

Continuation Sheet

1. If you believe that the agency made a error(or error) in applying required procedures in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3, identify the procedure(s) and describe the error(s).

The proposal letter is authored by an employee that is not my supervisor nor in my chain of command. It states that I would receive a written decision from the Deciding Official. Before the Deciding Official issued her decision, the Agency Management Official, Human Resources Official, and Management Representative produced an EEOC Settlement Agreement and forced me to sign it to avoid termination which included suspension, forced retirement, removal from supervisory position, barred from future Commerce Employment and removal at Agency discretion. Douglass Factors and disability not considered if misconduct is concuded. My time and attendance were approved and certified by supervisor and division chief. The motive of the charges brought in the Proposal was punitive. The Deciding Official released her decision four days later deciding not to terminate but suspend for 30 days without a hearing.

[redacted]

Continuation Sheet

2. Explain how the error you in response to question 1 above caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

There was no misconduct on my part in any of my behavior and therefore no charge should have been filed. Informal accomodations had been made by my supervisor since 2007-2008 not accounted for in the proposal. The agency did not consider or give adequate consideration to the factual evidence provided. The Deciding Official decided on a 30-day suspension only. The Agency's motive was to get my pending EEOC action claiming race and age discrimination off of the table without settleing fairly and remove me for past EEO claims.

Please type or print legibly.

OMB NO. 3124-0009

Name *(last, first, middle initial)* Perry, Anthony, W.

Discrimination - An allegation of discrimination is not an independent source of Board jurisdiction. The underlying action must first be within the Board's jurisdiction before an allegation of discrimination may be considered by the Board. See 5 CFR 1201.151.

1. Check the appropriate box (or boxes) below to indicate the basis (or bases) of your claim that you are discriminated against by the agency in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3.

☐ Discrimination based on marital status or political affiliation	☑ Race	☐ Color	☐ Religion
☐ Sex(Title VII of the Civil Rights Act of 1964)	☐ National Origin	☑ Disability	☑ Age
☐ Sex(sexual harassment under Title VII of the Civil rights Act of 1964)			

2. If you believe you were discriminated against by the agency, in connection with the matter appealed, because of your race, color, religion, sex, national origin, disability, or age, explain why you believe it to be true.

See Continuation Sheet for Response.

3. Have you filed a formal discrimination complaint with your agency concerning the action you are appealing?

☐ Yes ☑ No

4. If your answer to question 3 is "Yes", enter the place where the complaint was filed if different from your answer to question 5 on MSPB Form 185-1:

NOT APPLICABLE

5. Date filed (month, day, year):

NOT APPLICABLE

6. Has a decision been issued?

NOT APPLICABLE

REQUEST FOR COMPENSATORY DAMAGES

7. Are you requesting an award of compensatory damages in connection with your discrimination claim? See 5 CFR 1201.202(c).

☑ Yes ☐ No

[redacted]

Continuation Sheet

2. If you believe you were discriminated against by the agency, in connection with the matter appealed, because of your race, color, religion, sex, national origin, disability, or age, explain why you believe it to be true.

The charging document failed to reasonably account for my disability and the near total reason for the behavior the agency is charging. Prior accommodations had been made by my supervisor. I was retaliated against for my past EEO actions claiming race and age discrimination. This matter is retaliation and was orchestrated by the management official and the human resources official. I was applying/requesting to be promoted and complained that younger Caucasians with less skill, credentials and record of past performance were being promoted above me. To keep from promoting me or addressing prior and ongoing discrimination the agency coerced me to sign the EEOC Settlement or be terminated.

[redacted]

Please type or print legibly. OMB No. 3124-0009

Name *(last, first, middle initial)* Perry, Anthony, W.

Prohibited Personnel Practices - The statutory prohibited personnel practices are set forth at 5 U.S.C. 2302(b)(1)-(b)(12). An allegation of a prohibited personnel practice is not an independent source of Board jurisdiction. The underlying action must first be within the Board's jurisdiction before an allegation of a prohibited personnel practice may be considered by the Board. See 5 CFR 1201.56(b)(2).

Section 2302 of title 5, U.S. Code, does not apply to all personnel actions or to all Federal employees. Please review the definitions of "personnel action," "covered position," and "agency" at 5 U.S.C. 2302(a) to be sure that both you and the action or decision you are appealing are covered by those definitions before you complete and submit this form.

1 Check the appropriate box (or boxes) below to indicate the basis (or bases) of your claim that the agency committed a prohibited personnel practice in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3.

- ☐ Discrimination based on political affiliation
- ☐ Coercing the political activity of any person
- ☐ Discrimination based on marital status
- ☐ Nepotism (favoring relatives)
- ☐ Soliciting or considering employment recommendations not based on the individual's work performance, ability, aptitude, general qualifications, suitability, character, or loyalty
- ☑ Taking or failing to take a personnel action as a reprisal for the exercise of any appeal, complaint or grievance right; for assisting anyone else in exercising such a right; for cooperating with or disclosing information to the Special Counsel or the Inspector General of an agency; or for refusing to violate a law
- ☑ Deceiving or willfully obstructing a person's right to compete for employment
- ☐ Influencing any person to withdraw from competition for any position, whether to help or hurt anyone else's employment prospects
- ☑ Giving unauthorized preferential treatment to any employee or applicant
- ☑ Discriminating on the basis of personal conduct which does not adversely affect the performance of the employee or applicant or the performance of others, except in case of criminal conviction for the conduct
- ☐ Taking or failing to take any other personnel action that would violate any law, rule, or regulation implementing or directly concerning the merit system principles

e-Appeal Attachment Transmittal

Appeal Number: 201201588
Appellant Name: Mr. Anthony W. Perry
Agency Name: Department of Commerce

Please check the box for each document included with this transmittal.

	Name of Attachment	Attachment Processing Status	File Name/Delivery Method
☐	Agency Decision Letter	Upload with e-Appeal	coercedsign0001.pdf
☐	SF-50, Notification of Personnel Action	Document not available or not applicable	N/A

2 copies must be submitted of all documents submitted in hardcopy.
Send documents to be submitted in paper form to:
Washington DC Regional Office
1800 Diagonal Road Suite 205
Alexandria, Virginia 22314-2840
United States of America

Phone: (703) 756-6250
Fax: (703) 756-7112

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AND
BRIEFS.

Supreme Court, U.S.
FILED
FEB 27 2017
OFFICE OF THE CLERK

No. 16-399

IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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February 27, 2017

QUESTION PRESENTED

The Merit Systems Protection Board (MSPB) is authorized to hear challenges by certain federal employees to certain major adverse employment actions. If such a challenge involves a claim under the federal anti-discrimination laws, it is referred to as a "mixed" case. This case presents the following question:

> Whether an MSPB decision dismissing a mixed case on jurisdictional grounds is subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit.

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INTRODUCTION

This case presents this Court with an opportunity to finish the job it started in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012): to bring coherence and clarity to the statutory regime governing judicial review of federal employees' employment-related disputes. That regime authorizes judicial review of three distinct categories of disputes: (1) disputes arising entirely under the federal civil-service laws, (2) disputes arising entirely under the federal anti-discrimination laws, and (3) "mixed" disputes arising under *both* the federal civil-service laws and the federal anti-discrimination laws. Everyone agrees that the first category of disputes is subject to judicial review in the U.S. Court of Appeals for the Federal Circuit, while the second category of disputes is subject to judicial review in federal district court. The question here, as in *Kloeckner*, is whether the third category of disputes is subject to judicial review in the Federal Circuit or district court.

And here, as in *Kloeckner*, the statute answers that question "in crystalline fashion," 133 S. Ct. at 604: cases involving both civil-service claims and discrimination claims are subject to review in district court to preserve federal employees' statutory "right" to "trial de novo" of their discrimination claims. 5 U.S.C. §§ 7702(a)(1); 7702(e)(3); 7703(b), (c). The Federal Circuit, like other appellate courts, is not in the business of trying discrimination claims de novo, which is why the statutory regime channels both pure discrimination cases and mixed cases to district court. That simple point is the beginning and the end of this case.

Certainly the creation of the Merit Systems Protection Board (MSPB) as part of the Civil Service Reform Act of 1978 (CSRA) did not divest federal employees of their right to try their employment discrimination claims de novo in district court. The MSPB reviews only (1) pure civil-service cases and (2) mixed cases (because of their civil-service component); it never reviews pure discrimination cases. And, if an employee seeks judicial review of an adverse MSPB decision, the CSRA sends the employee to a different court depending on what type of case is involved: challenges to MSPB decisions in pure civil-service cases go to the Federal Circuit, while challenges to MSPB decisions in mixed cases (because of their discrimination component) go to district court.

The lesson of *Kloeckner* is that determining the proper court for review of an MSPB order in a mixed case has nothing to do with whether the MSPB reaches the *merits* of the discrimination claim. Rather, the CSRA distinguishes between "kind[s] of case[s]" (pure civil-service cases vs. mixed cases), "[r]egardless" of the ground on which the MSPB resolves a particular case. 133 S. Ct. at 604. The Government's contrary position in *Kloeckner* failed to garner a single vote.

Nonetheless, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment), the Government now seeks to resurrect the grounds-of-MSPB-dismissal theory rejected as "contriv[ed]" in *Kloeckner*. 133

S. Ct. at 604. Except now the Government's theory is even more contrived. According to the Government, when the MSPB disposes of a mixed case on *procedural* grounds, that case is reviewed in district court (per *Kloeckner*). But when the MSPB disposes of such a case on *jurisdictional* grounds, the Government insists that the case must be reviewed in the Federal Circuit. That jurisdiction/procedure distinction has no basis in law or logic, and is unworkable in practice.

Indeed, the Government itself acknowledged in *Kloeckner* that a jurisdiction/procedure distinction "has no basis" in the statute, and would be "difficult and unpredictable" to apply in practice. Br. for Resp. at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261, at *25 n.3; Br. for Resp. in Opp. at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted). That is, if anything, an understatement. A distinction that is "hazy at best and incoherent at worst" deprives both courts and federal employees (many, if not most, of whom proceed *pro se*) of the necessary "clear guidance about the proper forum for the employee's claims at the outset of the case," *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2135 (2012), subverts the statutory objective of allowing federal employees to try their discrimination claims de novo in district court, and plunges a straightforward statutory scheme into a morass of complexity.

Like *Kloeckner*, this is an easy case. Everyone agrees that petitioner is entitled to challenge the MSPB's dismissal of his case; the only question is where. Because the case involves discrimination

claims subject to trial de novo, the statute channels the case to district court, not the Federal Circuit. Accordingly, this Court should reverse the judgment and allow petitioner to pursue his claims in district court.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 829 F.3d 760 and reprinted in the Petition Appendix (Pet. App.) at 1-15a. The MSPB's most recent decision is reported at 2014 WL 5358308, and reprinted at Pet. App. 20-31a. The Administrative Judge's most recent decision is unreported, and reprinted at Pet. App. 32-58a. The MSPB's original decision is reported at 2013 WL 9678428, and reprinted at Pet. App. 59-70a. The Administrative Judge's original decision is unreported, and reprinted at Pet. App. 71-80a.

JURISDICTION

The D.C. Circuit entered judgment on July 22, 2016. Pet. App. 1a. Petitioner filed a timely petition for certiorari on September 27, 2016, which this Court granted on January 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are in the Statutory and Regulatory Appendix at the back of this brief.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Anthony W. Perry was hired by the U.S. Census Bureau in Suitland, Maryland, in 1982, and worked for that agency as an Information Technology Specialist for the next thirty years. Pet.

App. 3a. In the mid-2000s, Perry developed osteoarthritis and began to suffer persistent groin, buttock, and hip pain. *Id.* To help Perry manage the pain, his supervisor allowed him to take breaks during normal working hours and to make up missed time or complete outstanding projects after hours. *Id.* Around the same time, Perry filed a series of complaints with the Census Bureau's Equal Employment Opportunity (EEO) office, and later before an Administrative Judge of the Equal Employment Opportunity Commission (EEOC), alleging discrimination based on race and age, and (later) reprisals based on his pending discrimination claims. Those complaints alleged that Perry had been passed over for promotions, denied training, and received unwarranted performance evaluations as a result of discrimination. Joint Appendix (JA) 42-43, 48; Pet. App. 3-4a.

On June 7, 2011, Perry received a Notice of Proposed Removal from a Census Bureau employee who was not his direct supervisor. The Notice proposed to terminate Perry's employment, alleging that he had been absent during regular working hours and thus had been paid for hours he had not worked. Perry responded that there was no basis for the charges, pointing to the informal accommodation that his supervisor had provided and his unblemished disciplinary record.

In August 2011, Perry and the Census Bureau entered into a settlement agreement that required him to serve a suspension for thirty calendar days, retire no later than September 4, 2012, and release his claims. Pet. App. 35-38a; JA 26-34. Shortly thereafter, the Census Bureau issued a formal notice

suspending Perry for 30 days. JA 35-36. Pursuant to the settlement agreement, Perry left the Census Bureau in April 2012. JA 37.

B. Proceedings Below

After Perry served his 30-day suspension and his retirement took effect, he filed a *pro se* appeal with the MSPB. To initiate such a proceeding, the appellant must fill out a series of forms specifying the nature of his claims. Perry checked the boxes for "Involuntary Retirement" and "Suspension for more than 14 days." JA 40. In an attachment, he claimed that he had been improperly suspended and coerced into retirement. He argued that the Census Bureau's proposed removal notice was the product of race, age, and disability discrimination as well as retaliation for his prior discrimination complaints; that the agency could not substantiate the charges against him; and that the agency had misrepresented his appeal rights during the settlement process. As a result, he claimed that the agency had coerced him into signing the August 2011 settlement agreement in which he released his claims. JA 42-43, 45-46, 48; *see generally Garcia v. Department of Homeland Sec.*, 437 F.3d 1322, 1324 (Fed. Cir. 2006) (*en banc*) (a "facially voluntary action by the employee may actually be involuntary" if coerced by the agency); *Conforto v. MSPB*, 713 F.3d 1111, 1120 (Fed. Cir. 2013) ("The employee in such cases may claim that he was forced to resign or retire in part or in whole because of discrimination by the agency ...."); *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (coercion also established by showing "that the agency knew that the reason for the threatened removal could not be substantiated").

An administrative judge (AJ) ordered Perry to show cause why the challenge should not be dismissed for lack of jurisdiction. Pet. App. 81-89a. "Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board," Pet. App. 82a, and "the Board cannot review the same claims over which you entered into a settlement agreement with the agency," Pet. App. 86a. Perry responded that the settlement agreement had been coerced, and that his release of his claims therein was thus involuntary. He submitted almost two hundred pages of evidence to support his claims. The Census Bureau responded by submitting its own evidence and argument for why the settlement agreement was valid, and Perry thereby had voluntarily released his claims.

After reviewing the evidence but without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction. Pet. App. 71-80a. In particular, the AJ decided that both the 30-day suspension and retirement were voluntary because they resulted from a valid settlement agreement. Pet. App. 74-76a. Perry petitioned the Board for review of the AJ's decision.

As relevant here, the Board granted the petition, and remanded the case to the AJ for further proceedings. Pet. App. 59-70a. The Board concluded that Perry had "made a nonfrivolous allegation of involuntariness sufficient to warrant a jurisdictional hearing," Pet. App. 66a, and that the AJ had thus erred by dismissing the case without holding such a hearing, Pet. App. 67-70a.

On remand, the AJ held a hearing and concluded that Perry "failed to prove that he was coerced or

detrimentally relied on misinformation when he agreed to settle his appeals." Pet. App. 33a. Accordingly, the AJ once again dismissed the appeal for lack of jurisdiction. *See id.* And Perry once again petitioned the Board for review.

This time, however, the Board affirmed the AJ. Pet. App. 20-31a. The Board concluded that Perry "failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because [he] validly waived his appeal rights therein." Pet. App. 27a. The Board's decision included a "**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**." Pet. App. 30a. That notice stated in pertinent part:

> You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:
>
> United States Court of Appeals
> for the Federal Circuit
> 717 Madison Place, N.W.
> Washington, DC 20439

Id.

Notwithstanding the notice, Perry—still proceeding *pro se*—filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. That court promptly entered an order directing Perry to "show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the

United States Court of Appeals for the Federal Circuit." Pet. App. 18a. After Perry and the Government both filed briefs on the jurisdictional issue, the D.C. Circuit discharged the show-cause order. Pet. App. 16-17a. The court directed the parties to "address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. § 7703(b)(1)(B); and (2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2)," and appointed counsel as *amicus curiae* "to present arguments in favor of petitioner's position." Pet. App. 17a. Judge Henderson dissented from the order, noting that she "would grant [the Government's] request to transfer the case to the Federal Circuit." Pet. App. 16a n.*.

In the subsequent briefing, everyone (including petitioner) agreed that the D.C. Circuit lacked jurisdiction. Pet. App. 5a. Thus, the only question was whether that court should transfer the case to the Federal Circuit or district court. *Id.*; *see generally* 28 U.S.C. § 1631. The D.C. Circuit held, based on pre-*Kloeckner* circuit precedent, that it was constrained to transfer the case to the Federal Circuit. *See* Pet. App. 2-3a (citing *Powell v. Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998)). *Powell* held that all MSPB decisions "based on procedural or threshold matters," even those "related to the merits," are subject to review in the Federal Circuit. *Id.* at 599. *Powell* did not distinguish between jurisdictional and procedural (or other threshold) dispositions. *Powell*, in turn, relied on *Ballentine v. MSPB*, 738 F.2d 1244 (Fed. Cir. 1984), which held that all MSPB decisions in mixed cases are appealable to the Federal Circuit "until the

merits of a 'mixed' discrimination case are reached by the MSPB." *Id.* at 1247 (emphasis in original).

The D.C. Circuit held below that *Powell* was not necessarily incompatible with *Kloeckner* because the MSPB had dismissed the appeal in *Powell* (like the appeal here) on *jurisdictional* grounds, whereas the MSPB had dismissed the appeal in *Kloeckner* on *procedural* grounds. Pet. App. 7-15a. "In short," the court concluded, "we remain bound by *Powell*," and thus transferred this case to the Federal Circuit. Pet. App. 15a.

The Federal Circuit docketed the appeal, but granted Perry's unopposed motion to hold the briefing in abeyance pending the filing and disposition of a petition for certiorari. *See* Order [Dkt. 21], *Perry v. MSPB*, No. 2016-2377 (Fed. Cir. Aug. 31, 2016).

Perry timely petitioned for a writ of certiorari, which this Court granted on January 13, 2017.

SUMMARY OF ARGUMENT

As relevant here, federal employees enjoy two distinct layers of statutory protection related to their employment: (1) protection under the federal civil-service laws, and (2) protection under the federal anti-discrimination laws. There is no conflict between these two layers of protection, and federal employees may pursue claims under either or both without the need to split those claims.

In particular, a federal employee with *both* civil-service *and* discrimination claims can choose between different avenues of relief. After exhausting internal agency procedures, the employee may proceed directly to federal district court. Or the

employee may choose to avail himself of the MSPB, an independent adjudicatory body for federal civil-service claims. If the MSPB fails to afford the employee the relief sought, the employee may then pursue his claims in federal district court *regardless* of whether the MSPB reached the merits of the claims. The point is simple: cases involving discrimination claims *always* go to federal district court, where the employee is entitled to a trial de novo on his discrimination claims. They *never* go to the Federal Circuit, which (like any other appellate court) cannot take new evidence, provide a jury, or otherwise consider the employee's discrimination claim de novo, as is the employee's right.

That is the lesson of this Court's recent decision in *Kloeckner*. The D.C. Circuit, however, attempted to distinguish *Kloeckner* on the ground that the MSPB there dismissed the employee's claims on *procedural* grounds, whereas the MSPB here dismissed the employee's claims on *jurisdictional* grounds. That is a distinction without a difference. Nothing in the statute turns on the grounds on which the MSPB dismisses an employee's case; rather, as noted above, the proper forum for judicial review turns on the nature of the employee's claims.

Indeed, the Government itself acknowledged in *Kloeckner* that the ostensible jurisdiction/procedure distinction "has no basis" in the statute, and would be "difficult and unpredictable" to apply in practice. The Government was right then, and is wrong now. Nothing in the statute purports to establish a jurisdiction/procedure distinction, and such an amorphous distinction would be impossible for federal employees (many, if not most, of whom

proceed *pro se*) to apply in practice. Accordingly, this Court should reverse the judgment.

ARGUMENT

MSPB Decisions Dismissing Mixed Cases On Either Jurisdictional Or Procedural Grounds Are Reviewed In Federal District Court.

A. The Statutory Framework

This case arises at the intersection of the federal civil-service laws and the federal anti-discrimination laws. The Civil Service Reform Act of 1978, 5 U.S.C. § 1101 *et seq.*, created the MSPB and empowered that agency to review certain serious personnel actions against federal employees: "(1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less," 5 U.S.C. § 7512; *see also id.* §§ 7513(d), 7701(a); 5 C.F.R. § 1201.3 (listing actions subject to MSPB review); *see generally Kloeckner*, 133 S. Ct. at 600-01 & n.1. Appeals from MSPB decisions, in turn, generally go to the Federal Circuit, *see* 5 U.S.C. § 7703(b)(1)(A), which reviews such decisions under the deferential standards applicable to judicial review of agency action, *see id.* § 7703(c). Federal employees subject to a less serious personnel action (*e.g.*, a one-day suspension) generally have no recourse under the civil-service laws beyond their own agency. *See, e.g.*, 5 U.S.C. § 7503.

In addition to their rights under the federal civil-service laws, federal employees also have employment-related rights under the federal anti-discrimination laws. But unlike the civil-service laws, the anti-discrimination laws are *not* limited to

certain serious personnel actions; rather, they broadly apply to "[a]ll personnel actions affecting employees or applicants for employment." 42 U.S.C. § 2000e-16(a) (Title VII); *see also* 29 U.S.C. § 206(d) (Fair Labor Standards Act (FLSA) equal pay provision); *id.* §§ 631(b), 633a(a) (Age Discrimination in Employment Act) (ADEA). Typically, a federal employee must exhaust a discrimination claim through an Equal Employment Opportunity (EEO) office within the employing agency, and may (but need not) appeal an adverse decision to the Equal Employment Opportunity Commission (EEOC). *See, e.g.*, 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1614.101 - 1614.110.

If these avenues do not prove fruitful, the employee may then file a discrimination complaint in federal district court. *See, e.g.*, 42 U.S.C. § 2000e-16(c) (Title VII); 29 U.S.C. § 216(b) (FLSA); *id.* § 633a(c) (ADEA); 29 C.F.R. § 1614.407 (Title VII, ADEA, and Rehabilitation Act). That complaint does not seek review of agency action; rather, it triggers a straightforward discrimination lawsuit in which the factfinder owes no deference to the agency, and (depending on the relief sought) the employee may be entitled to a jury trial. *See, e.g.*, 42 U.S.C. §§ 1981a(a)(1), (c) (plaintiffs entitled to jury trial in certain Title VII cases); *see generally Chandler v. Roudebush*, 425 U.S. 840, 845-46, 849, 864 (1976) (holding that Congress gave federal employees the same rights as private-sector employees to try their discrimination claims in district court).

Needless to say, claims under the civil-service laws and the anti-discrimination laws are not mutually exclusive, and many federal employees

pursue both. That presents a logistical challenge, because (as described above) there are different paths for pursuing civil-service claims and discrimination claims. To prevent the need for claim-splitting, Congress gave federal employees various options for pursuing these "mixed" cases—*i.e.*, those in which "an employee complains of a personnel action serious enough to appeal to the MSPB *and* alleges that the action was based on discrimination." *Kloeckner*, 133 S. Ct. at 601 (emphasis in original); *see also* 5 U.S.C. § 7702(a); 29 C.F.R. § 1614.302(a).

An employee may pursue a mixed case in the first instance in one of two ways: (1) by filing a complaint with the employing agency's EEO office, or (2) by filing an appeal directly with the MSPB. *See* 5 U.S.C. § 7702(a); 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b); *see generally Kloeckner*, 133 S. Ct. at 601. The employee, however, may not file in both of these fora at once. *See* 29 C.F.R. § 1614.302(b). If the employee does so, "whichever is filed first shall be considered an election to proceed in that forum." *Id.*

Should the employee choose to file a mixed case complaint with the employing agency in the first instance, and receive an adverse decision, she has yet another choice about where to proceed. "If the agency decides against her, the employee may then either [1] take the matter to the MSPB or [2] bypass further administrative review by suing the agency in district court." *Kloeckner*, 133 S. Ct. at 601 (citing 5 C.F.R. § 1201.154(b); 29 C.F.R. § 1614.302(d)(1)(i)); *see also* 5 U.S.C. § 7702(a)(2); 29 C.F.R. § 1614.310(a).

Alternatively, the employee may choose to pursue a mixed case by "bringing her case directly to the MSPB, forgoing the agency's own system for evaluating discrimination charges." *Kloeckner*, 133 S. Ct. at 601 (citing 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b)). "If the MSPB upholds the personnel action (whether in the first instance or after the agency has done so), the employee again has a choice: She may request additional administrative process, this time with the EEOC, or else she may seek judicial review." *Id.* (citing 5 U.S.C. §§ 7702(a)(3), (b); 5 C.F.R. § 1201.161; 29 C.F.R. § 1614.303)); *see also* 5 U.S.C. § 7703(a).

And, *Kloeckner* held, a district court—not the Federal Circuit—is the proper forum for reviewing mixed cases arising from the MSPB, regardless of whether the MSPB reaches the merits of the discrimination claim. *See Kloeckner*, 133 S. Ct. at 604. That result flows from the plain language of "two sections of the CSRA," Section 7703 ("Judicial review of decisions of the Merit Systems Protection Board") and Section 7702 ("Actions involving discrimination"). *Id.* at 603. "Under § 7703(b)(2), 'cases of discrimination subject to [§ 7702]' shall be filed in district court." *Id.* at 604 (brackets in original). And "[u]nder § 7702(a)(1), the 'cases of discrimination subject to [§ 7702]' are mixed cases—those appealable to the MSPB and alleging discrimination." *Id.* (brackets in original). "Ergo, mixed cases shall be filed in district court." *Id.*

In other words, the statutory regime channels all cases alleging discrimination to district court. Some of those are pure discrimination cases, *see, e.g.*, 42 U.S.C. § 2000e-16(a), and some are cases involving

both discrimination and serious civil-service claims, *see, e.g.*, 5 U.S.C. § 7702(a). If the MSPB has jurisdiction (because of the presence of a serious civil-service claim) it is a "[c]ase[] of discrimination subject to the provisions of section 7702," and it goes to district court. *Id.* § 7703(b)(2). If the MSPB lacks jurisdiction over the civil-service component of an ostensibly mixed case, all that means is that the case is actually a pure discrimination case. It still goes to district court. Either way—if there is a civil-service claim within the MSPB's jurisdiction or not—the case goes to district court. The only cases that go to the Federal Circuit are pure civil-service cases with no discrimination component.

That result makes sense. Employees with discrimination claims need not pursue civil-service claims at all, and even if they do, they need not take such claims to the MSPB. Rather, as noted above, an employee with both civil-service and discrimination claims may bypass the MSPB entirely by "suing the agency in district court" after exhausting internal agency procedures. *Kloeckner*, 133 S. Ct. at 601 (citing 5 C.F.R. § 1201.154(b); 29 C.F.R. § 1614.302(d)(1)(i)); *see also* 5 U.S.C. § 7702(a)(2); 29 C.F.R. § 1614.310(a). The entire system is set up, in the words of the statute, to preserve federal employees' "right" to try their discrimination claims "de novo" in district court. 5 U.S.C. § 7702(e)(3); *see also id.* § 7703(c); S. Rep. No. 95-969, at 63, 1978 U.S.C.C.A.N. 2723, 2785 ("District court is a more appropriate place than the Court of Appeals for [mixed cases] since they may involve additional fact-finding."); *Chandler*, 425 U.S. at 845-48. Under no circumstance is an employee's decision to seek MSPB review of a mixed case a waiver of the employee's

right to pursue discrimination claims in federal district court.*

B. A Jurisdiction/Procedure Distinction Has No Basis In Law Or Logic, And Is Unworkable In Practice.

Notwithstanding *Kloeckner*, the D.C. Circuit held below that this case belongs in the Federal Circuit. *See* Pet. App. 5-15a. That result, according to the court, was dictated by pre-*Kloeckner* circuit precedent holding that cases dismissed by the MSPB on jurisdictional grounds are subject to review in the Federal Circuit even where (as here) they involve discrimination claims. *See* Pet. App. 7-8a (citing *Powell*, 158 F.3d at 599-600). *Powell* was not necessarily inconsistent with *Kloeckner*, the court declared, because *Kloeckner* involved a case dismissed by the MSPB on procedural (as opposed to jurisdictional) grounds. *See* Pet. App. 8-14a; *see also Conforto*, 713 F.3d at 1115-21 (similarly distinguishing *Kloeckner*).

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* A district court is perfectly capable not only of trying an employee's discrimination claims, but also of reviewing an employee's civil-service claims under the standards applicable to judicial review of agency action. *See Kloeckner*, 133 S. Ct. at 607 n.4 (citing *Williams v. Department of the Army*, 715 F.2d 1485, 1491 (Fed. Cir. 1983) (*en banc*)); *Butler v. West*, 164 F.3d 634, 639 n.10 (D.C. Cir. 1999). In this sense, there is a notable asymmetry in the relative capabilities of district courts and the Federal Circuit: whereas a district court can try discrimination claims as well as review agency action (subject, on both scores, to review by the regional circuit), the Federal Circuit (like any other appellate court) has no ability to try discrimination claims in the first instance.

The D.C. Circuit thereby erred. The jurisdiction/procedure distinction on which it relied to distinguish *Kloeckner* (1) has no basis in law or logic, and (2) is unworkable in practice. Each of these points is discussed in turn below.

1. A Jurisdiction/Procedure Distinction Has No Basis In Law Or Logic.

The D.C. Circuit purported to distinguish *Kloeckner*, and justify its continued reliance on pre-*Kloeckner* circuit precedent, based on the language of the statute. *See* Pet. App. 11-12a. As the court explained, "an appeal from an MSPB decision generally belongs in the Federal Circuit unless the case appealed from is a mixed case, in which event review lies in the district court." Pet. App. 11a. The court then got to the heart of the matter. According to the D.C. Circuit, a case dismissed by the MSPB on jurisdictional grounds is not a "mixed case" at all—even if it involves both civil-service and discrimination claims—because "[t]he statute describes a mixed case as one in which the employee both alleges discrimination and 'has been affected by an action which [she] *may appeal* to the' MSPB." *Id.* (quoting 5 U.S.C. § 7702(a)(1)(A); emphasis added by D.C. Circuit); *see also Conforto*, 713 F.3d at 1118 (same). In other words, if the MSPB ultimately determines that the employee's civil-service claims are insufficiently serious to warrant MSPB review, then the case is not a "[c]ase[] of discrimination subject to the provisions of section 7702" that is reviewable in district court under Section 7703(b)(2) *even though it includes discrimination claims.*

Based on this statutory language, the D.C. Circuit sought to distinguish a "jurisdictional"

dismissal from the "procedural" dismissal at issue in *Kloeckner*. When the MSPB dismisses a case on jurisdictional grounds, the court held, "the Board necessarily concludes that [the employee] has not 'been affected by an action which [she] may appeal to the' MSPB." Pet. App. 12a (quoting 5 U.S.C. § 7702(a)(1)(A)). When the MSPB dismisses a case on procedural grounds, in contrast, "the case may still be viewed as one in which the employee was 'affected by an action which [she] may appeal to the' MSPB." *Id.* (quoting 5 U.S.C. § 7702(a)(1)(A)). That is because "the *action* affecting the employee is one she can appeal to the Board." Pet. App. 13a (emphasis added by D.C. Circuit). "It may turn out that she brings her appeal in a procedurally deficient fashion—such as by bringing it too late—but the action itself was appealable." *Id.* "In addition, with procedurally defective appeals, unlike jurisdictionally barred appeals, the Board can excuse the procedural error and permit the appeal to go forward." *Id.* (citing *Conforto*, 713 F.3d at 1118 n.1).

But that approach makes this issue far more complicated than necessary. The statute refers to neither jurisdiction nor procedure; rather, it refers only to an employee who "has been affected by an action which [he] may appeal to the [MSPB]." 5 U.S.C. § 7702(a)(1)(A). It does not say that the employee must be affected by an action that he may *successfully* appeal; rather, the appeal may be barred on either procedural or jurisdictional grounds. But the fact that the MSPB may ultimately determine that the appeal is barred on either procedural or jurisdictional grounds does not mean that the employee has not "been affected by an action which [he] may appeal" to the MSPB. *Id.* Were the law

otherwise, *Kloeckner* would be wrongly decided: the employee in that case was not "affected by an action which [she] may appeal" to the MSPB, because her appeal was time-barred. *See* 133 S. Ct. at 602-04.

Indeed, the Government itself made this point in *Kloeckner*. According to the Government, a jurisdiction/procedure distinction "has no basis" in the statute, because the statutory text "applies equally to an appeal, like [the one in *Kloeckner*], that is not timely filed." *Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3; *Kloeckner* Br. for Resp. in Opp. at 15-16, 2011 WL 6281813, at *15-16 (internal quotation omitted) (citing *Stahl v. MSPB*, 83 F.3d 409, 412-13 (Fed. Cir. 1996)); *see also Conforto*, 713 F.3d at 1124 (Dyk, J., dissenting). The Government thus relied on an entirely different theory in *Kloeckner*: that "[w]hen the Board disposes of an appeal on grounds that do not touch on discrimination," appeals from MSPB decisions go to the Federal Circuit "regardless of whether the decision rests on jurisdictional or procedural grounds." *Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3. After this Court unanimously rejected that theory in *Kloeckner*, that should have been the end of the matter.

Instead, the Government now embraces the very jurisdiction/procedure distinction that it repudiated in *Kloeckner*. But that theory still has "has no basis" in the statute. *Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3. Here, Perry was "affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), because he challenged the voluntariness of the settlement agreement in which he released claims challenging

his suspension and removal. Indeed, the MSPB exercised jurisdiction over Perry's case not once but twice and rendered two decisions. *See* Pet. App. 59-70a (first decision); Pet. App. 20-31a (second decision). The fact that the MSPB ultimately *rejected* Perry's claim of involuntariness on the merits did not retroactively divest the MSPB of jurisdiction to render that decision. Because the MSPB indisputably had—and exercised—jurisdiction over this case, the suggestion that this is not a case that Perry could "appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), is just the sort of convoluted reasoning that this Court unanimously rejected in *Kloeckner*. *See* 133 S. Ct. at 604.

In any event, the D.C. Circuit's ostensible textual argument is not compelled by the text and turns the overall statutory scheme on its head. The D.C. Circuit assumed that an employee has not "been affected by an action which [she] may appeal to the' MSPB," Pet. App. 12a (quoting 5 U.S.C. § 7702(a)(1)(A)), if the MSPB ultimately concludes that the employee has not been affected by an action sufficiently serious to trigger MSPB jurisdiction. But that assumption begs the question whether "an action which [the employee] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), refers to (1) a case in which the employee *claims* that he has been subjected to a personnel action sufficiently serious to warrant MSPB review, or (2) a case in which the MSPB ultimately *concludes* that the employee has been subjected to a personnel action sufficiently serious to warrant MSPB review.

Although the D.C. Circuit assumed, without analysis, that the statute refers to the latter of these

options, the former represents the background norm in American law. As this Court has explained, "[n]ormal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995). A federal court thus may exercise jurisdiction based on the allegations of a "well-pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998).

The same principle governs here: an MSPB appeal that, on its face, claims that (1) an employee "has been affected by an action which [he] may appeal to the [MSPB]," and (2) "a basis for the action was discrimination," 5 U.S.C. § 7702(a)(1)(A), (B), is a "[c]ase[] of discrimination subject to the provisions of section 7702," *id.* § 7703(b)(2), *regardless* of whether the MSPB ultimately accepts or rejects those claims. Indeed, that is precisely how the relevant EEOC regulation defines a "mixed case appeal": "an appeal filed with the MSPB that *alleges* that an appealable agency action was effected, in whole or in part, because of discrimination ...." 29 C.F.R. § 1614.302(a)(2) (emphasis added); *see also Kloeckner*, 133 S. Ct. at 607 ("A federal employee who *claims* that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court.") (emphasis added); *Conforto*, 713 F.3d at 1126 n.5 (Dyk, J., dissenting). Congress did not need to specify that the statutory requirements for a "mixed case" are satisfied by the employee's allegations, just as Congress did not need to specify that the requirements for federal court jurisdiction are satisfied by a plaintiff's allegations. *See* 28 U.S.C.

§ 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *id.* § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 ... and is between ... citizens of different States.").

And that point is particularly compelling in the MSPB context, where a dispute over whether an employee "has been affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), often overlaps with the merits of the case. *See, e.g.*, *Shoaf v. Department of Agric.*, 260 F.3d 1336, 1341 (Fed. Cir. 2001) ("[W]e have recognized that the MSPB's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined.") (internal quotation omitted). This case is a perfect example. The MSPB ultimately determined that it lacked jurisdiction over Perry's civil-service claims on the ground that he voluntarily released those claims by entering into a valid settlement with his employing agency. *See* Pet. App. 27a. But the validity of the settlement is at the heart of the dispute on the *merits* with respect to both Perry's civil-service and discrimination claims. *See, e.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) ("In determining the effectiveness of any ... waiver" of discrimination claims in a settlement agreement, "a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing.").

In essence, the MSPB concluded that it lacked jurisdiction because Perry's claims fail on the merits.

But that is the exact opposite of how our legal system generally operates: whether a complainant's allegations succeed or fail on the merits has nothing to do with the adjudicator's jurisdiction over those allegations. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Bell v. Hood*, 327 U.S. 678, 682 (1946). Ostensible federal questions fail on the merits every day in federal court, but "it is an old, old principle that the plaintiff's loss on the merits does not retroactively divest the court of jurisdiction." *Mid-American Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 292 (7th Cir. 1995) (Easterbrook, J.).

At best, the D.C. Circuit's ruling that this is not a "mixed" case because the MSPB ultimately concluded that it lacked jurisdiction is circular. The MSPB does not have the last word on its own jurisdiction. Rather, its jurisdictional determinations—like any of its other determinations—are subject to judicial review. Such review takes place in the Federal Circuit in pure civil-service cases, but in district court in mixed cases. *See* 5 U.S.C. §§ 7703(b)(1)(A), (b)(2). Where, as here, an employee challenges the MSPB's jurisdictional determination, it makes no sense to give that very determination conclusive weight in deciding where that determination is to be reviewed. Nothing in the CSRA suggests that the MSPB has the power to dictate which court reviews its decisions.

And yet that is the result of the D.C. Circuit's approach, which improperly assumes the correctness of the MSPB's jurisdictional determination when that issue is disputed. If the MSPB's determination that an employee failed to bring "an action which

[he] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), were conclusive, there would be no basis or need for judicial review of that determination at all, even in the Federal Circuit. A conclusive determination that the employee has no right to appeal to the MSPB means that the employee has no right to review under the civil-service laws at all, *either* in the MSPB *or* in the Federal Circuit. Because the path to review in the Federal Circuit runs through the MSPB, it cannot possibly be that a case that has conclusively been determined not to belong in the MSPB nonetheless belongs in the Federal Circuit.

What is more, if the D.C. Circuit were correct that a case dismissed by the MSPB on jurisdictional grounds has conclusively been determined not to be a "mixed case," *see* Pet. App. 11-14a, then it is a pure discrimination case subject to review in district court, not a pure civil-service case subject to review in the Federal Circuit. But it is perverse to conclude that a case that includes both civil-service and discrimination claims belongs in the Federal Circuit *precisely because* the civil-service claims are insufficient to trigger MSPB jurisdiction.

Given that the entire statutory regime is set up to channel cases involving discrimination claims to district court, *see, e.g.*, 5 U.S.C. § 7702(e)(3), it cannot possibly be that cases involving discrimination claims go to the Federal Circuit when the MSPB concludes that there has not been a sufficiently serious action under the *civil-service* laws to trigger its jurisdiction. As long as there is a dispute over whether an employee "has been affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C.

§ 7702(a)(1)(A), the fact that the MSPB resolves that dispute against the employee does not mean that the employee was never entitled to present that dispute to the MSPB in the first place.

Indeed, the statutory scheme as a whole would make no sense if there were no way to determine whether an employee has filed a "[c]ase[] of discrimination subject to the provisions of section 7702," 5 U.S.C. § 7703(b)(2), unless and until the MSPB adjudicated the employee's claims. As an initial matter, an employee need not take such a mixed case to the MSPB at all; rather, as noted above, Section 7702 itself allows him to take such a case directly from the employing agency to district court. *See* 5 U.S.C. § 7702(a)(2); *see also* 29 C.F.R. §§ 1614.302(d)(1)(i), 1614.310(a), (g). Because Section 7702 allows an employee with a mixed case to bypass the MSPB altogether, the existence *vel non* of a "[c]ase[] of discrimination subject to the provisions of section 7702," 5 U.S.C. § 7703(b)(2), cannot possibly turn on anything the MSPB does or does not do. The decision below effectively penalizes employees who choose to pursue mixed cases through the Board rather than proceeding directly to district court.

In addition, an employee needs to know at the outset whether he is pursuing a pure discrimination case or a mixed case because those different types of cases are subject to different deadlines. In a pure discrimination case, the employee generally has 45 days to contact the employing agency's EEO office. *See* 29 C.F.R. § 1614.105(a). But if he intends to pursue a mixed case, then he has only 30 days to file a complaint with the agency or an appeal with the

Board. *See* 5 C.F.R. § 1201.154(a). Under the decision below, an employee has no way to know which deadline applies until after his case has been fully resolved.

Similarly, Section 7702 requires the employing agency or the MSPB to resolve a "mixed" case within 120 days of filing; if the agency or MSPB fails to do so, the employee may then proceed directly to district court. *See* 5 U.S.C. §§ 7702(a)(1), (2); 7702(e)(1), (2); *see also* 29 C.F.R. §§ 1614.310(g), (h). Needless to say, this regime would make no sense if the employee, agency, or Board had no way of knowing whether a case is "subject to the provisions of section 7702," 5 U.S.C. § 7703(b)(2), at the outset, as opposed to at some undefined point down the road.

Finally, the D.C. Circuit's analysis fails on its own terms, at least on the facts of this case. Here, there can be no question that Perry was subjected to a personnel action (a thirty-day suspension) sufficiently serious to trigger the Board's jurisdiction. *See* Pet. App. 21-22a, JA 35-36. Rather, the only dispute is whether Perry released his right to challenge that suspension through his settlement agreement. But that dispute over the validity of the release involves the *merits* of Perry's challenge to his suspension, not the MSPB's jurisdiction. Nothing in the various statutory provisions endowing the MSPB with jurisdiction to review certain kinds of serious personnel actions, *see* 5 U.S.C. §§ 7512, 7513(d), 7701(a), purports to strip the agency of such jurisdiction where the Government defends on the basis of a release.

Indeed, in ordinary civil litigation, the existence of a release is a defense; the absence of a release is

not an element of the claim that must be alleged by the plaintiff in the complaint. *See, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 391 (1987); *United States v. Rogers Cartage Co.*, 794 F.3d 854, 860 (7th Cir. 2015). The same should be true here. Perry released his claims as part of a settlement. If the Government wishes to rely on the release to defeat those claims, it can only be as part of its defense; the validity of the settlement is irrelevant to whether there is jurisdiction over the claims in the first place.

Although the MSPB dismissed this case for lack of jurisdiction after concluding that Perry's settlement agreement with the Census Bureau was voluntary, the voluntariness of Perry's settlement has nothing to do with the Board's jurisdiction over his suspension claims. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-63 (2010); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452-56 (2004). At least where, as here, an agency action of sufficient gravity to trigger MSPB jurisdiction is involved, a case challenging such action is one that the employee "may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), regardless of whether the MSPB ultimately concludes that the employee voluntarily agreed to release his claims.

2. A Jurisdiction/Procedure Distinction Is Unworkable In Practice.

In addition to lacking any textual basis, and subverting federal employees' statutory right to try their discrimination claims de novo in district court, the jurisdiction/procedure distinction advanced by the D.C. Circuit to distinguish *Kloeckner* is unworkable in practice.

Few issues have greater bedeviled courts over the years than trying to draw a line between "jurisdictional" and "procedural" (or "claim processing") rules. That distinction can have significant implications in some contexts, because jurisdictional issues cannot be forfeited by litigants, but may (and indeed must) be raised and addressed by an Article III court at any stage of the proceedings. *See, e.g.*, *Kontrick*, 540 U.S. at 455-56. "'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings,'" and "[c]ourts, including this Court, ... have been less than meticulous" in distinguishing between jurisdictional and procedural rules. *Id.* at 454 (quoting *Steel Co.*, 523 U.S. at 90). These concerns led to a line of recent cases in which this Court sought to limit the label "jurisdictional" only to the rules governing an adjudicatory body's "adjudicatory authority," *id.* at 455—typically where Congress specifically labels a particular rule as "jurisdictional," *Arbaugh*, 546 U.S. at 515-16; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-36 (2011); *Reed Elsevier*, 559 U.S. at 160-62; *Bowles v. Russell*, 551 U.S. 205, 209-11 (2007); *id.* at 215-20 (dissenting opinion); *Scarborough v. Principi*, 541 U.S. 401, 413 (2004).

Putting aside the fact (addressed in the previous subsection) that there is nothing "jurisdictional" about the Government's defense that an employee voluntarily released a challenge to a 30-day suspension in a settlement agreement, it is highly implausible that Congress meant for the determination of the proper court to review MSPB decisions to turn on the elusive and "confusing" jurisdiction/procedure distinction. *Reed Elsevier*, 559 U.S. at 161. Given that even the most seasoned

judges and lawyers have trouble drawing that distinction, *compare Bowles*, 551 U.S. at 209-11, *with id.* at 215-20 (dissenting opinion), MSPB claimants (many, if not most, of whom proceed *pro se*) cannot realistically be expected to do so, *see, e.g.*, U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2017* (Feb. 2016), at 14 ("Generally, at least half or more of the appeals filed with the agency are from *pro se* appellants."), available at http://tinyurl.com/zcv6lxj (last visited February 27, 2017). If Congress had wanted to send jurisdictional dismissals to the Federal Circuit and procedural dismissals to district court, "it could have just said so." *Kloeckner*, 133 S. Ct. at 605.

Indeed, the Government itself acknowledged in *Kloeckner* that superimposing a dispositive jurisdiction/procedure distinction over this statutory scheme makes no sense. As the Government put it:

> [A]s a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [the jurisdiction/procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

Kloeckner Br. for Resp. in Opp. at 15-16, 2011 WL 6281813, at *15-16. Thus, the Government emphasized in *Kloeckner*, the jurisdiction/procedure distinction not only "has no basis" in the statute, but also would be "difficult and unpredictable" to apply in practice. *Id.* (internal quotation omitted); *see also Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3; *Conforto*, 713 F.3d at 1124-25 (Dyk, J., dissenting) (further explaining why "any distinction between 'procedural' and 'jurisdictional' Board decisions would be unworkable in practice"). Nothing in the statute has changed; only the Government's position has.

As this Court has long recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* The need for easily administrable rules is particularly acute in this context, given that the Federal Government is the Nation's largest employer, and confusion here has the potential to generate a massive volume of satellite litigation.

The relevant statutes provide a bright-line rule, which this Court articulated in *Kloeckner*: "A federal employee who *claims* that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court," regardless of whether the MSPB reaches the merits of the claims, or instead dismisses on either procedural or jurisdictional grounds. 133 S. Ct. at

607 (emphasis added); *see* 5 U.S.C. §§ 7703(b), (c). Period. There is no need to dissect the MSPB decision, or to engage in a metaphysical analysis of the "amorphous" jurisdiction/procedure distinction. *Elgin*, 132 S. Ct. at 2136.

The point here, as in *Kloeckner*, is plain: the proper forum for judicial review of an MSPB decision turns on "the nature of an employee's claim," not the basis for the MSPB's decision. *Elgin*, 132 S. Ct. at 2134. Cases involving discrimination claims belong in district court, whether an employee has invoked the MSPB review process or not. Because this case indisputably involves discrimination claims, Perry is entitled to proceed in federal district court.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment.

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Respectfully submitted,

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STATUTORY AND REGULATORY APPENDIX

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5 U.S.C. § 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title,

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

5 U.S.C. § 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

> **(1)** at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> **(2)** a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> **(3)** be represented by an attorney or other representative; and
>
> **(4)** a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * *

5 U.S.C. § 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

* * *

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of

this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

* * *

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)

(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United

States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the

right to have the facts subject to trial de novo by the reviewing court.

* * *

5 C.F.R. § 1201.154. Time for filing appeal.

For purposes of this section, the date an appellant receives the agency's decision is determined according to the standard set forth at 1201.22(b)(3) of this part. Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

> **(a)** Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision on the appealable action, whichever is later.
>
> **(b)** If the appellant has filed a timely formal complaint of discrimination with the agency:
>
> > **(1)** An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or
> >
> > **(2)** If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days. Once the agency resolves the matter or issues a final decision on the formal complaint, an appeal must be filed within 30 days after the appellant receives the agency

resolution or final decision on the discrimination issue.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under § 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

29 C.F.R. § 1614.302. Mixed case complaints.

(a) Definitions—

(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information.

(b) *Election.* An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an

election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal.*

(1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB,

pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that § 1614.107(a)(4) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a nonmixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed

initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and (ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

29 C.F.R. § 1614.310. Right to file a civil action.

An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

RECORD
AND
BRIEFS

No. 16-399

In the Supreme Court of the United States

ANTHONY W. PERRY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 5 U.S.C. 7703(b)(2), which creates an exception to exclusive Federal Circuit review of Merit Systems Protection Board (MSPB or Board) decisions in cases where "an action which [an] employee * * * may appeal to the [Board]" is alleged to involve discrimination, 5 U.S.C. 7702(a)(1)(A), applies to a case in which the MSPB determines that the relevant action is not one that the employee may appeal to the Board.

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In the Supreme Court of the United States

No. 16-399

ANTHONY W. PERRY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 829 F.3d 760. The final order of the Merit Systems Protection Board (Pet. App. 20a-31a) is unreported but is available at 2014 WL 5358308. The initial decision of an administrative judge (Pet. App. 32a-58a) is unreported. An earlier order of the Merit Systems Protection Board (Pet. App. 59a-70a) is unreported but is available at 2013 WL 9678428. An earlier initial decision of an administrative judge (Pet. App. 71a-80a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2016. The petition for a writ of certiorari was filed on September 27, 2016, and was granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. See App., *infra*, 1a-34a.

STATEMENT

A. Statutory And Regulatory Framework

The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, creates a comprehensive "framework for evaluating adverse personnel actions against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (brackets omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 774 (1985)). The CSRA "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* In fashioning the protections and remedies in the CSRA, Congress sought to strike a "balance" between "the legitimate interests of the various categories of federal employees" and "the needs of sound and efficient administration." *Id.* at 445.

1. The Merit Systems Protection Board

a. The CSRA established the Merit Systems Protection Board (MSPB or Board), an administrative agency that acts as "an independent adjudicator of federal employment disputes." *Kloeckner* v. *Solis*, 133 S. Ct. 596, 600 (2012); see 5 U.S.C. 1201-1206. The MSPB may adjudicate only "matters within [its] jurisdiction * * * under [Title 5], chapter 43 of title 38, or any other law, rule, or regulation." 5 U.S.C. 1204(a)(1). Ar employee "may submit an appeal to" (*i.e.*, seek administrative review from) the Board when he or she has been subject to a personnel "action

which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701(a).

The relevant laws generally limit the Board's jurisdiction to "particularly serious" employment actions, *Kloeckner*, 133 S. Ct. at 600, such as a removal or suspension of more than 14 days on grounds of misconduct. See 5 U.S.C. 7512, 7513(a) and (d) (permitting appeal to Board from certain actions taken "for such cause as will promote the efficiency of the service"); 5 U.S.C. 7512 (2012 & Supp. III 2015); see *Cornelius* v. *Nutt*, 472 U.S. 648, 651 (1985) (observing that those provisions apply to a removal for "misconduct"); see also *Arnett* v. *Kennedy*, 416 U.S. 134, 160-163 (1974) (opinion of Rehnquist, J.) (describing history and meaning of statutory phrase "such cause as will promote the efficiency of the service"). Less severe types of actions—including reassignments and denials of promotions, see, *e.g.*, 5 U.S.C. 2302(a)(2)(A)(ii) and (iv)—typically are not appealable to the Board. See, *e.g.*, *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983).

In reviewing a serious action, the MSPB determines whether the action was supported by a preponderance of the evidence, was procedurally valid, and was otherwise in accordance with the CSRA and other law. 5 U.S.C. 7701(c)(1)(B) and (2); see *Cornelius*, 472 U.S. at 651. For an action based on employee misconduct, the Board may review not only the employing agency's finding that misconduct occurred, but also the appropriateness of the penalty that the employing agency imposed. See, *e.g.*, *Douglas* v. *Veterans Admin.*, 5 M.S.P.R. 280, 296-303 (1981).

b. "Nothing in 5 U.S.C. § 7512, which enumerates specific adverse actions over which the Board has

jurisdiction, extends the Board's jurisdiction to facially voluntary acts." *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc); see 5 C.F.R. 752.401(b)(9); Pet. App. 4a. "A long line of cases, however, starting with the Board's predecessor, the Civil Service Commission * * * dealt with this question, and generally held that seemingly voluntary actions in some circumstances may be considered adverse actions." *Garcia*, 437 F.3d at 1328. Under that longstanding approach, the MSPB has asserted "jurisdiction over an appeal filed by an employee who has resigned or retired if his or her resignation or retirement was involuntary and thus tantamount to forced removal." *Ibid.* (quoting *Shoaf* v. *Department of Agric.*, 260 F.3d 1336, 1340-1341 (Fed. Cir. 2001)); see also, *e.g.*, *Gratehouse* v. *United States*, 512 F.2d 1104, 1108 (Ct. Cl. 1975); see, *e.g.*, *Putnam* v. *Department of Homeland Sec.*, 121 M.S.P.R. 532, 543 (2014) ("An involuntary retirement * * * is equivalent to a forced removal within the Board's jurisdiction under chapter 75.").

Under the Board's regulations, the appealing employee "has the burden of proof, by a preponderance of the evidence * * * with respect to * * * [i]ssues of jurisdiction." 5 C.F.R. 1201.56(b)(2)(i)(A); see 5 U.S.C. 7701(a) ("Appeals shall be processed in accordance with regulations prescribed by the Board."). If an employee "makes nonfrivolous allegations of jurisdiction, i.e., allegations that, if proven, would establish the Board's jurisdiction, he is entitled to a hearing at which he must prove jurisdiction by a preponderance of the evidence." *Mims* v. *Social Sec. Admin.*, 120 M.S.P.R. 213, 222 (2013); see *Garcia*, 437 F.3d at 1344. In cases where an employee has retired,

the Board generally applies a "presumption of voluntariness," which an employee may attempt to "rebut * * * in a variety of ways, for example, by showing that the retirement was the result of misinformation or deception by the agency, intolerable working conditions, or the unjustified threat of an adverse action." *Mims*, 120 M.S.P.R. at 222.

c. One "structural element[]" that is "clear in the framework of the CSRA" is "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review" in "disputes over adverse personnel action." *Fausto*, 484 U.S. at 449. In general, judicial review of "a final order or final decision" of the Board falls within the Federal Circuit's "exclusive jurisdiction." 28 U.S.C. 1295(a)(9); see 5 U.S.C. 7703(b)(1)(A) and (d). When the Federal Circuit reviews an MSPB decision, it may correct any procedural or substantive legal errors; vacate any action that is "arbitrary, capricious, [or] an abuse of discretion"; and set aside any findings that are "unsupported by substantial evidence." 5 U.S.C. 7703(c).

2. Mixed cases

The CSRA currently includes two exceptions to the generally exclusive authority of the Federal Circuit to review the MSPB's disposition of a federal employee's appeal. See 5 U.S.C. 7703(b)(1)(B) and (b)(2). The exception directly relevant here encompasses "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2); see Pet. App. 5a.[1] Those

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[1] The other exception is a temporary exception under which cases that involve only claims of whistleblower reprisal may be reviewed in "any court of appeals of competent jurisdiction." 5 U.S.C. 7703(b)(1)(B) (2012 & Supp. III 2015).

are cases in which an employee (or applicant for employment) (A) "has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board" and (B) "alleges that a basis for the action was discrimination prohibited by" one of several listed antidiscrimination laws, including laws prohibiting race, age, and disability discrimination in federal employment. 5 U.S.C. 7702(a)(1). When presented with a case that satisfies both of those criteria, the Board is required to "decide both the issue of discrimination and the appealable action," *ibid.*, and its decision is reviewable in district court, 5 U.S.C. 7703(b)(2).

a. The MSPB does not possess any generalized jurisdiction to review discrimination claims by federal employees, and most cases in which such a claim is raised will proceed without involving the MSPB at all. Title VII of the Civil Rights Act of 1964 (which prohibits race and sex discrimination), the Rehabilitation Act of 1973 (which prohibits disability discrimination), and the Age Discrimination in Employment Act of 1967 (ADEA) all contain freestanding provisions authorizing suit in district court against federal agencies alleged to have engaged in discrimination. See 29 U.S.C. 633a(c) (civil actions under ADEA); 42 U.S.C. 2000e-16(c) (civil actions under Title VII); see also 29 U.S.C. 794a(a)(1) (Rehabilitation Act incorporating Title VII remedial scheme). An employee may sue under those statutes only after exhausting his administrative remedies, a requirement that is typically satisfied by presenting a formal equal employment opportunity (EEO) complaint to the employing agency and obtaining a final decision. See 29 U.S.C. 633a(d), 794a(a)(1); 42 U.S.C. 2000e-16(c); 29 C.F.R.

1614.105(a); see, *e.g.*, *Green* v. *Brennan*, 136 S. Ct. 1769, 1775-1776 (2016); see also 29 U.S.C. 633a(d) (permitting ADEA suit without EEO complaint when employee gives Equal Employment Opportunity Commission (EEOC) 30 days' notice of intent to sue).

In 5 U.S.C. 7702, however, the CSRA specifies a set of "special procedures" governing administrative exhaustion of a so-called "'mixed case,'" in which "an employee complains of a personnel action serious enough to appeal to the MSPB *and* alleges that the action was based on discrimination." *Kloeckner*, 133 S. Ct. at 601. Under Section 7702, and implementing regulations promulgated by the MSPB and the EEOC, such an employee has the opportunity (although not the obligation) not only to exhaust his discrimination claim, but also to seek additional MSPB review of the relevant action's lawfulness under the CSRA (*e.g.*, whether the action was a valid penalty for misconduct). See 5 U.S.C. 7702; 5 C.F.R. 1201.151 (MSPB regulations); 29 C.F.R. 1614.302 (EEOC regulations).

Even in a mixed case, an employee may ignore the MSPB and pursue the case "much as an employee challenging a personnel practice not appealable to the MSPB could do." *Kloeckner*, 133 S. Ct. at 601. He may file what the regulations call a "mixed case complaint," in which he seeks review of the discrimination claim from the agency's EEO office, and then, if still aggrieved, file suit in district court under the antidiscrimination laws. 29 C.F.R. 1614.302(a)(1), (b), (d)(1)(i), and (d)(3); see 5 U.S.C. 7702(a)(2), 7703(b)(2); *Kloeckner*, 133 S. Ct. at 601. An employee who chooses that path is bypassing the opportunity to present

civil-service claims to the MSPB, and instead opting to focus solely on her discrimination claims.

b. An employee with a mixed case who wishes to exhaust his civil-service claims in the MSPB, or to obtain an additional layer of review on his discrimination claims from the MSPB, has two ways of doing so. First, he can file a mixed case complaint with the agency's EEO office as described above, but appeal to the MSPB rather than proceeding straight to district court. See 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.154; 29 C.F.R. 1614.302(d)(1)(ii); *Kloeckner*, 133 S. Ct. at 601. Second, he can file at the outset what the regulations call a "mixed case appeal," 29 C.F.R. 1614.302(a)(2), in which he "forgo[es] the agency's own system for evaluating discrimination charges" and instead "initiate[s] the process" of administrative review "by bringing [the] case directly to the MSPB." *Kloeckner*, 133 S. Ct. at 601; see 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.154(a); 29 C.F.R. 1614.302(b).

In either circumstance, the CSRA directs that the Board "shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with [its] appellate procedures." 5 U.S.C. 7702(a)(1); see 5 C.F.R. 1201.156(a). If the MSPB decides either issue in the employee's favor, it may require the employing agency to grant appropriate relief. See 5 U.S.C. 1204(a)(1)-(2). The Board's final decision on both issues becomes a "judicially reviewable action" unless the employee seeks additional administrative process from the EEOC. See 5 U.S.C. 7702(a)(3) and (b); 5 C.F.R. 1201.161; 29 C.F.R. 1614.303.

The regulations implementing Section 7702 provide curative measures that an employee can invoke if he

believes that his discrimination case involves an employment action appealable to the MSPB but the Board disagrees and therefore rejects the appeal. See 29 C.F.R. 1614.302(b). In such situations, the employing agency must protect the employee's ability to litigate his claim as a pure (*i.e.*, non-mixed) discrimination case under the antidiscrimination laws. See *ibid.* Specifically, if an employee "files a timely appeal with MSPB from the [employing] agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons," the employing agency must allow the employee to request a fresh decision on his EEO complaint, which will reset his time limit for filing an antidiscrimination suit in district court. *Ibid.*; see 29 C.F.R. 1614.110(a). Similarly, if an employee "files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons," the employing agency must "promptly notify" the employee of his right to file an EEO complaint and must provide him with a new window of time in which to do so. 29 C.F.R. 1614.302(b). Once the employee exhausts his discrimination claim by filing the EEO complaint, he may (if still aggrieved) file an antidiscrimination suit in district court. See 29 C.F.R. 1614.110(a).

c. Under 5 U.S.C. 7703(b)(2), an employee may seek judicial review of an adverse MSPB decision in a mixed case through a "fil[ing] under the enforcement sections of the" relevant antidiscrimination laws. *Kloeckner*, 133 S. Ct. at 601 (brackets omitted) (quoting 5 U.S.C. 7702(a)(1), 7703(b)(2)). Those enforcement provisions "all authorize suit in federal district court," *ibid.*, where an employee is entitled to "trial de

novo" of his discrimination claim, without deference to the MSPB's decision, 5 U.S.C. 7703(c).

The judicial-review provisions do not explicitly prescribe how (or whether) a district court is to review the MSPB's disposition of the portion of a mixed case that does not arise under an antidiscrimination statute —*e.g.*, an MSPB determination that a removal constituted a valid penalty for employee misconduct. The courts of appeals, however, have interpreted 5 U.S.C. 7703(c) to permit district-court review of that aspect of the MSPB's decision under the same deferential standard of review that the Federal Circuit would apply if the action were challenged solely under the CSRA. See, *e.g.*, *Sher* v. *United States Dep't of Veterans Affairs*, 488 F.3d 489, 499 (1st Cir. 2007) (citing Federal and D.C. Circuit decisions), cert. denied, 552 U.S. 1309 (2008); see also *Kloeckner*, 133 S. Ct. at 607 n.4 (recognizing that, "[i]f the MSPB rejects on the merits a complaint alleging that an agency violated the CSRA as well as an antidiscrimination law, the suit will come to district court for a decision on both questions").

B. Petitioner's Case

1. Petitioner is a former employee of the United States Census Bureau who faced removal on charges that he was absent from work for hours at a time and refused to document his time properly. Pet. App. 3a. In response to the notice of proposed removal, petitioner claimed that he had an informal arrangement that permitted him to take walking breaks to relieve a medical condition. *Ibid.* Petitioner eventually entered into a settlement agreement with the Bureau, under which, *inter alia*, he agreed to serve a 30-day suspension, take an early retirement, and withdraw pending

complaints he had filed with the EEOC. *Ibid.* Petitioner served the agreed-upon suspension, took the retirement, and applied for the $25,000 in severance pay to which he would be entitled as a voluntary retiree. *Id.* at 21a, 38a n.3.

Petitioner later appealed his suspension and retirement to the MSPB, alleging that the Bureau's charges had been motivated by age, race, and disability discrimination and retaliation for his filing of discrimination claims. Pet. App. 4a. He also alleged that the Bureau had coerced him into signing the settlement agreement by threatening baseless discriminatory employment actions and by misrepresenting his appeal rights. *Id.* at 4a, 22a-23a. That second set of allegations was critical to the Board's authority since "the Board generally lacks jurisdiction to review voluntarily accepted actions." *Id.* at 4a.

2. An MSPB administrative judge initially dismissed the case for lack of jurisdiction, finding that petitioner had "voluntarily agreed to the 30-day suspension" and had "voluntarily entered into the settlement agreement that required him to retire." Pet. App. 75a; see *id.* at 71a-80a. The Board, however, "found that [petitioner's] claim, that the agency coerced him into signing the settlement agreement by misinforming him that he would not have Board appeal rights if it effectuated his removal, constituted a nonfrivolous allegation of involuntariness entitling him to a jurisdictional hearing." *Id.* at 22a; see *id.* at 59a-70a.

The administrative judge held such a hearing. Pet. App. 23a; see *id.* at 32a-58a. Petitioner "declined to testify" and "presented no evidence" in support of his allegation "that the agency misled him by stating that

he would have no right of appeal if the agency removed him." *Id.* at 23a, 25a. The witnesses at the hearing, including the union representative who had assisted him in negotiating the settlement agreement, "all testified that: (1) they did not advise [petitioner] that he would not have appeal rights if he failed to sign the settlement agreement and the agency removed him; and (2) they were not aware of anyone at the agency who so informed [petitioner]." *Id.* at 25a; see *id.* at 45a-46a. The union representative additionally testified that he and petitioner, rather than the agency, had "devised retirement as a possible settlement term," *id.* at 26a; that petitioner was "smart," *id.* at 46a; and that petitioner had "definitely understood what he was doing" when he agreed to the settlement, *ibid.* After the hearing, the administrative judge found "no fraud, coercion or misrepresentation" that would render the retirement involuntary; determined "that the Board lack[ed] jurisdiction over th[e] appeal"; and concluded that the appeal "must be dismissed." *Id.* at 47a, 51a.

The Board affirmed the administrative judge's jurisdictional dismissal. Pet. App. 20a-31a. "The evidence in the record," the Board found, "contradicts [petitioner's] claim that the agency misled him with respect to his potential appeal rights." *Id.* at 25a. The Board accordingly rejected petitioner's contention "that he [was] entitled to mixed appeal rights." *Id.* at 30a. The Board explained that petitioner's appeal was "not a mixed case because [the Board] lack[ed] jurisdiction over it." *Ibid.* (citing *Conforto* v. *MSPB*, 713 F.3d 1111, 1118 (Fed. Cir. 2013)).

3. After the MSPB dismissed his appeal, petitioner did not seek to exhaust his discrimination claim with

the Bureau's EEO office. Instead, he filed a pro se petition for D.C. Circuit review of the MSPB's decision. Pet. App. 4a.

Petitioner ultimately acknowledged that no CSRA provision gave the D.C. Circuit jurisdiction over the case. Pet. App. 5a. The court of appeals accordingly considered, with the aid of an appointed amicus curiae, the question of where to transfer the case. *Ibid.*; see 28 U.S.C. 1631 (permitting transfers of petitions for review of administrative action in order to cure lack of jurisdiction). The court concluded that the Board's decision was within the scope of the Federal Circuit's exclusive review. Pet. App. 1a-15a.

The court of appeals held that 5 U.S.C. 7703(b)(2)'s special rule for mixed cases—*i.e.*, cases in which an employee alleges discrimination in "an action which [he] may appeal to the [Board]," 5 U.S.C. 7702(a)(1)—does not apply to a case in which the underlying personnel action was determined not to be appealable to the MSPB. Pet. App. 7a-15a. The court observed that its prior decision in *Powell* v. *Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998), had identified the Federal Circuit as the proper venue for judicial review in such a case. Pet. App. 7a-8a. The court further explained that, when "the Board dismisses [an employee's] appeal based on a lack of jurisdiction, the Board necessarily concludes that she has not 'been affected by an action which [she] may appeal to the' MSPB." *Id.* at 12a (second set of brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)).

The court of appeals joined the Federal Circuit in concluding that this Court's decision in *Kloeckner* v. *Solis*, *supra*, which held that MSPB "*procedural* dismissals" in mixed cases should be reviewed "in district

court," did not require the same result with respect to "*jurisdictional* dismissals." Pet. App. 3a; see *id.* at 9a-15a (citing *Conforto*, 713 F.3d at 1116-1119). The court noted that "all sides [in this case] agree that *Kloeckner* did not involve the precise issue raised by * * * this case." *Id.* at 8a. The court explained that *Kloeckner* "did not involve a jurisdictional dismissal," but instead the dismissal "on the procedural ground of untimeliness" of an "adverse action" that was "no doubt * * * within the Board's jurisdiction." *Ibid.* The court observed that oral argument in *Kloeckner* had highlighted the potential for a "material distinction between procedural and jurisdictional dismissals," and that the decision in *Kloeckner* had "specifically defined the issue by reference to MSPB dismissals on 'procedural grounds.'" *Id.* at 8a-10a (quoting *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607).

The court of appeals further reasoned that the language of the CSRA—which "describes a mixed case as one in which the employee both alleges discrimination and 'has been affected by an action which [she] *may appeal* to the' MSPB"—"suggests a distinction between jurisdictional dismissals * * * and procedural dismissals." Pet. App. 11a-12a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). The court explained that, even if an appeal is brought "in a procedurally deficient fashion," the "*action* affecting the employee" nevertheless may be one that "she can appeal to the Board," and the Board can hear the case if it chooses to disregard the procedural defect. *Id.* at 13a-14a. "That is not the case with a jurisdictional dismissal." *Id.* at 13a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that judicial review of petitioner's asserted right to appeal his case to the MSPB falls within the exclusive jurisdiction of the Federal Circuit. Petitioner had and still has the right to pursue a pure discrimination case by exhausting his discrimination claims through an EEO complaint and then (if still aggrieved) seeking a de novo trial on those claims in district court. But if petitioner wants a court to review the MSPB's determination that he lacks the additional right to invoke the Board's jurisdiction, the only court that may do so is the Federal Circuit, which Congress created in part to serve as the centralized forum for exactly that type of issue.

I. District-court review of an MSPB decision is available only in "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2). Those are discrimination cases involving employment actions "which [the employee] may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A)—*i.e.*, the subset of discrimination cases (referred to as "mixed cases") in which an appeal to the Board would be available. When an employee asserts a right to have his discrimination case considered by the MSPB, but the Board determines that an appeal is unavailable, that determination warrants deference, and the case should not be treated as a mixed case "subject to the provisions of section 7702." Rather, the employee can either avail himself of procedures that allow him to start (or resume) pursuit of a pure discrimination case, see 29 C.F.R. 1614.302(b), or else seek judicial reversal of the MSPB's determination that Board review is unavailable. Unless and until that determination is reversed, however, the mixed-case provisions—including

the provision under which MSPB decisions in mixed cases are reviewed in district court—are inapplicable.

Applying the default rule of Federal Circuit exclusivity in these circumstances effectuates the CSRA's structural preference for "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review," *United States* v. *Fausto*, 484 U.S. 439, 449 (1988). It also makes sound practical sense. In every other circumstance, the Federal Circuit would be the exclusive forum for review of an MSPB appealability determination. Divesting that court of authority to review this particular subset of appealability determinations would serve no evident purpose and would undermine the Federal Circuit's ability to create a uniform body of law on appealability.

II. The decision below does not deprive petitioner of the opportunity for a de novo trial on his discrimination claims. The judicial review that the court of appeals transferred to the Federal Circuit is not review of petitioner's *discrimination claims*, which he will be able to file in district court once he has exhausted them administratively. It is instead review of the discrete question whether the MSPB should have entertained his appeal. Review of that question is within the exclusive jurisdiction, and the exclusive competence, of the Federal Circuit.

Petitioner's reliance on *Kloeckner* v. *Solis*, 133 S. Ct. 596 (2012), is misplaced. In *Kloeckner*, "[n]o one * * * contest[ed]" that the employee's discrimination case involved "an action (*i.e.*, removal) appealable to the MSPB." *Id.* at 604. The Court accordingly held that the employee could seek district-court review of the MSPB's decision, notwithstanding the Board's dismissal of the appeal "on procedural grounds." *Id.*

at 600. Here, in contrast, the prerequisites for district-court review were not satisfied because the Board determined that petitioner was *not* "affected by an action * * * appealable to the MSPB," *id.* at 604.

Petitioner argues that an employee's allegation that an employment action is appealable to the Board should supersede the Board's own determination that it is not. But the CSRA defines the relevant "[c]ases of discrimination subject to the provisions of section 7702" as cases satisfying two criteria: that the employee "allege[] * * * discrimination," and that the employee "has been affected by an action which [she] may appeal to the [Board]." 5 U.S.C. 7702(a)(1), 7703(b)(2); see *Kloeckner*, 133 S. Ct. at 603-604. The statute thus makes an allegation conclusive of the former criterion but not of the latter. Accordingly, when the MSPB has determined that the latter criterion is absent, the employee's contrary view cannot be given controlling weight. If an employee wants to contest the MSPB's determination, he must do so in the Federal Circuit.

ARGUMENT

I. THE CSRA CHANNELS JUDICIAL REVIEW OF MSPB APPEALABILITY DECISIONS TO THE FEDERAL CIRCUIT

A federal employee who alleges discrimination in connection with "an action which [he] may appeal to the" MSPB may replace or supplement the default procedure for exhausting discrimination claims by bringing his case before the Board. 5 U.S.C. 7702(a)(1)(A). Sometimes, an employee alleging discrimination tries to appeal to the MSPB, but the Board determines that it lacks jurisdiction because the underlying personnel action is not one that he

"may appeal" to it. Such an employee can then exhaust his discrimination claims in a different way and proceed to district court. See 29 C.F.R. 1614.302(b); see, *e.g.*, *Green* v. *Brennan*, 136 S. Ct. 1769, 1775-1776 (2016). Alternatively, he can seek judicial review of the MSPB's determination that the underlying action is not appealable. If he chooses that course, however, he cannot disregard the MSPB's determination of nonappealability and treat the case as one "appealable to the MSPB and alleging discrimination," in which review of an MSPB decision is "route[d] * * * to district court," *Kloeckner* v. *Solis*, 133 S. Ct. 596, 604 (2012). Instead, the proper judicial forum in such circumstances is the Federal Circuit, which was created in part to centralize the law governing appealable actions and which has exclusive authority to review all MSPB appealability determinations.

A. The Mixed-Case Exception To Exclusive Federal Circuit Review Of MSPB Decisions Does Not Apply When The MSPB Determines That A Case Is Not Mixed

Judicial review of a "final order or final decision" of the MSPB is generally subject to the "exclusive jurisdiction" of the Federal Circuit. 28 U.S.C. 1295(a)(9); see 5 U.S.C. 7703(b)(1)(A) and (d). The CSRA's provision for district-court review of Board decisions, 5 U.S.C. 7703(b)(2), is limited to so-called "'mixed cases,'" in which an employee (or applicant for employment) "challenges as discriminatory a personnel action appealable to the MSPB." *Kloeckner*, 133 S. Ct. at 602, 604. When the Board has determined that the relevant personnel action is *not* "appealable to the MSPB," *ibid.*, the matter should not be treated as a mixed case for purposes of judicial review.

1. Under 5 U.S.C. 7703, which "governs judicial review of the MSPB's rulings," employees' "petitions to review the Board's final decisions should be filed in the Federal Circuit" unless one of two specific exceptions applies. *Kloeckner*, 133 S. Ct. at 603; see 5 U.S.C. 7703(b)(1)(A). The only exception that would permit judicial review of an MSPB decision in district court appears in Section 7703(b)(2), which instructs that in certain "'[c]ases of discrimination,'" judicial review of an MSPB decision may be initiated by filing suit in district court "'under' the enforcement provision of an enumerated antidiscrimination statute." *Kloeckner*, 133 S. Ct. at 603 (brackets in original) (quoting 5 U.S.C. 7703(b)(2)). The particular "[c]ases of discrimination" to which that special rule applies are the subset of discrimination cases that are "subject to the provisions of [5 U.S.C.] 7702." 5 U.S.C. 7703(b)(2); see *Kloeckner*, 133 S. Ct. at 603.

Section 7702 "identifies the cases 'subject to [its] provisions'" as "cases in which a federal employee '(A) has been affected by an action which [she] may appeal to the Merit Systems Protection Board, and (B) alleges that a basis for the action was discrimination prohibited by' a listed federal statute." *Kloeckner*, 133 S. Ct. at 603-604 (brackets in original) (quoting 5 U.S.C. 7703(b)(2); 5 U.S.C. 7702(a)(1)). "The subsection thus describes what," under "the lingo of the applicable regulations," are referred to as "'mixed cases'"—"those appealable to the MSPB *and* alleging discrimination." *Id.* at 604 (emphasis added).

Not every discrimination case will be a mixed case, because not every discrimination case will involve a personnel action that is appealable to the Board. Rather, "[i]f (but only if) the action is particularly

serious"—such as "a removal from employment or a reduction in grade or pay"—does "the affected employee ha[ve] a right to appeal the agency's decision to the MSPB." *Kloeckner*, 133 S. Ct. at 600. Chapter 75 of Title 5, for example, "makes MSPB review * * * generally unavailable for minor adverse personnel action, including suspensions of less than 14 days." *United States* v. *Fausto*, 484 U.S. 439, 450 (1988); see 5 U.S.C. 7512(2), 7513(d); see also *Kloeckner*, 133 S. Ct. at 600 & n.1. Similarly, certain actions are appealable to the MSPB only by certain types of employees. See 5 U.S.C. 7511(a)(1), 7512, 7513(d); *Fausto*, 484 U.S. at 447 (observing that relevant protections apply only to "covered employees"). And, as particularly relevant here, because no statute explicitly allows an employee to appeal a facially voluntary act (*e.g.*, a retirement) to the MSPB, the Board has required an employee seeking to appeal such an act to show that it was actually involuntary (*e.g.*, a constructive removal). See, *e.g.*, 5 C.F.R. 752.401(b)(9); *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc); Pet. App. 4a; pp. 3-5, *supra*.

The MSPB "has not been granted jurisdiction over * * * 'pure' or 'naked' [discrimination] claims unaccompanied by an appealable action over which the Board does have jurisdiction." *Garcia*, 437 F.3d at 1342-1343 (citation omitted); see 5 U.S.C. 7702(a)(1). Accordingly, when an employee with a discrimination case tries to appeal to the MSPB, the Board must assure itself, as a threshold matter, that the case involves an appealable personnel action. See, *e.g.*, *Cruz* v. *Department of Navy*, 934 F.2d 1240, 1248 (Fed. Cir. 1991) (en banc) ("The Board was entirely correct in

looking first to its jurisdiction."). The Board's regulations require an employee who brings a case of discrimination (or any other case) to establish the appealability of the underlying action by a preponderance of the evidence. See 5 C.F.R. 1201.56(b)(2)(i)(A), 1201.152; *Garcia*, 437 F.3d at 1338-1340.

The appealability question is distinct from any procedural or merits question. An employee who is "affected by an action * * * appealable to the MSPB" remains so "[r]egardless whether the MSPB dismissed her claim on the merits or instead threw it out as untimely." *Kloeckner*, 133 S. Ct. at 604. "[T]he CSRA makes MSPB jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 18 (2012).

2. When the MSPB determines that a discrimination case does not involve "an action which the employee * * * may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A), the case cannot be considered a "[c]ase of discrimination subject to the provisions of section 7702," 5 U.S.C. 7703(b)(2). See *Kloeckner*, 133 S. Ct. at 603-604. It must instead be treated as a pure discrimination case, of the sort that "an employee challenging a personnel practice not appealable to the MSPB could" bring, *id.* at 601.

Treating the case as mixed, notwithstanding the MSPB's determination that it does not involve an appealable action, would be inconsistent with fundamental principles of deference to administrative decisions. See *Federal Power Comm'n* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972) (recognizing "[t]he need to protect the primary authority of an agency to determine its own jurisdiction"). A court

reviewing the MSPB's decision would generally be required to give weight to the Board's findings. Both the CSRA itself and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, prescribe an arbitrary-and-capricious standard of review for administrative decisionmaking. See 5 U.S.C. 7703(c)(1) (deferential review of MSPB determinations by the Federal Circuit); 5 U.S.C. 706(2)(A) (deferential review of agency decisions more generally); cf. *Kelliher* v. *Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002) (observing that courts reviewing mixed cases "uniformly" apply a deferential standard to "non-discrimination claims").[2] Thus, even when the employee seeks judicial review, the MSPB's decision as to appealability should be treated as presumptively correct.

The relevant EEOC regulations accordingly provide that, when the MSPB has found the underlying

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[2] Rejecting the contention that *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), is inapplicable in "jurisdictional disputes," the Federal Circuit has also accorded deference to MSPB regulations that address the procedures under which the Board will determine whether a particular action is appealable. See *Garcia*, 437 F.3d at 1338 (citation omitted). The Federal Circuit has stated, however, that (at least in the context of reviewing MSPB adjudications) it "review[s] the Board's legal conclusion[s] regarding the scope of its own jurisdiction * * * without deference." *Bolton* v. *MSPB*, 154 F.3d 1313, 1316 (1998), cert. denied, 526 U.S. 1088 (1999); see, *e.g.*, *Holderfield* v. *MSPB*, 326 F.3d 1207, 1208 (Fed. Cir. 2003). The Federal Circuit has not expressly reconciled those two approaches. Nor has it reconsidered its nondeferential approach to reviewing legal conclusions about jurisdiction in MSPB adjudications in light of this Court's recent reaffirmation of the principle that "*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1871 (2013) (citation omitted).

employment action in a discrimination case not to be appealable, the employee should be repositioned to pursue a pure discrimination case instead. Under 29 C.F.R. 1614.302(b), the employing agency must effectively restore such an employee to the position he was in before seeking MSPB review, thereby ensuring that his unsuccessful Board appeal does not prejudice his ability to litigate his discrimination claims. If the employee has not yet exhausted his discrimination claims through an EEO complaint, the agency must grant him a new period in which to do so. *Ibid.*; see 29 C.F.R. 1614.302(c)(2)(ii) (instructing that, if an EEO complaint has been held in abeyance pending an appeal to the MSPB, "the agency shall recommence processing of the mixed case complaint as a non-mixed case" if the "MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter"). And if the employee has already exhausted his discrimination claims through an EEO complaint, he is entitled to a fresh final decision that will restart the clock for filing suit in district court. 29 C.F.R. 1614.302(b).

3. An employee whose Board appeal in a discrimination case has been dismissed for lack of jurisdiction may elect not to proceed immediately with a pure discrimination case, but instead to seek judicial review of the MSPB's determination that the underlying personnel action is not appealable. An employee who chooses that course, however, has no basis for seeking such review in district court.

A case that is litigated under the antidiscrimination statutes alone—either because the employee pursued it as a pure discrimination case from the outset or because the MSPB has found it to be one—comes to a

district court as a standalone lawsuit, not as a request for judicial review of an MSPB decision. The relevant antidiscrimination statutes authorize suit against the federal government, but they do not in themselves provide for judicial review of MSPB decisions. See 29 U.S.C. 216(b), 633a(c); 42 U.S.C. 2000e-5(f), 2000e-16(c). Instead, judicial review of MSPB decisions is available only in the circumstances described in 5 U.S.C. 7703, the CSRA's provision for "Judicial review of decisions of the Merit Systems Protection Board." And the only paragraph of Section 7703 that authorizes judicial review of MSPB decisions in district court, 5 U.S.C. 7703(b)(2), limits such authorization to "[c]ases of discrimination subject to the provisions of section 7702," *ibid.*—that is, discrimination cases that are, in fact, "appealable to the MSPB," *Kloeckner*, 133 S. Ct. at 604.

Accordingly, when an employee seeks review of an MSPB determination that a case is *not* appealable to the Board, he cannot rely on Section 7702(b)(2), but instead is subject to Section 7703's default rule for judicial review of Board decisions. Under that rule, "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit." 5 U.S.C. 7703(b)(1)(A). The Federal Circuit will then decide the issue of appealability, just as it would in reviewing a nondiscrimination case that an employee unsuccessfully attempted to appeal to the MSPB. If it finds reversible error in the Board's determination, it will remand the case for further proceedings in the MSPB, to be followed by further processing of the matter as a mixed case under Section 7702. See *Conforto* v. *MSPB*, 713 F.3d 1111, 1120 (Fed. Cir. 2013); see, *e.g.*,

Colbath v. *Department of the Army*, 89 Fed. Appx. 727 (Fed. Cir. 2004) (per curiam). If it finds no such error, it will affirm the MSPB's determination. See, *e.g.*, *Cruz*, 934 F.2d at 1243-1248.

An employee who unsuccessfully seeks such review of an MSPB nonappealability decision does not lose his right to a de novo trial of his discrimination claims in district court. If the Federal Circuit affirms the Board's decision, the employee can then begin or continue to pursue his discrimination claims as a pure discrimination case under the antidiscrimination statutes, just as if he had never tried to appeal the case to the MSPB. The EEOC construes 29 C.F.R. 1614.302(b)'s requirement to reset an employee's time limit for pursuing a pure discrimination case to apply not only after an MSPB determination of nonappealability, but also after a Federal Circuit affirmance of such a determination. See, *e.g.*, *Karlene P.* v. *Burwell*, EEOC Decision No. 0320160054, 2016 WL 4425796, at *2 (Aug. 2, 2016); *Campbell* v. *Potter*, EEOC Decision No. 03-40046, 2004 WL 368078, at *1 n.2 (Feb. 17, 2004) (explaining that Section 1614.302(b) requires an agency to take steps "to process [a] claim as a 'non-mixed' matter" in that circumstance); see also *Sloan* v. *West*, 140 F.3d 1255, 1263 (9th Cir. 1998) ("[C]onsistent with the regulations, we hold that, when a 'mixed case claim' is filed with the MSPB, the statute of limitations for filing with the EEO and/or the EEOC are equitably tolled * * * until the appellant has received a final jurisdictional determination from the Federal Circuit.").[3] And courts have "uniformly

[3] The EEOC has previously viewed such tolling to be compelled by 5 U.S.C. 7702(f), which provides that, "[i]n any case in which an employee is required to file any action, appeal, or petition under

stated" that, in cases where the Board has dismissed for lack of jurisdiction, no determination of the Board or the Federal Circuit will have collateral-estoppel effect on a discrimination suit in district court. *Conforto*, 713 F.3d at 1120 n.4.

B. Exclusive Federal Circuit Review Of MSPB Nonappealability Determinations In Discrimination Cases Effectuates The CSRA's Structural Emphasis On Uniformity

Channeling review of MSPB nonappealability determinations in discrimination cases to the Federal Circuit preserves the ability of the Board and the Federal Circuit to develop a consistent body of law on federal employment matters. Permitting balkanized review of such determinations in the various district courts would subvert that critical feature of the CSRA.

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this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency." The government's brief in *Kloeckner* v. *Solis*, *supra*, took a similar view. See U.S. Br. at 37-38 (No. 11-184). The government has since determined, however, that Section 7702(f)—which explicitly applies only to cases governed by "this section" (*i.e.*, Section 7702)—cannot properly be construed to apply to a case that does not involve an appealable action. Such an interpretation would be inconsistent with Section 7702(a)(1)(A), which requires such an action, and with the EEOC's longstanding view "that where an individual files an appeal with the MSPB which is dismissed for lack of jurisdiction, the matter will not be viewed as a 'mixed case.'" *Nuno* v. *Rumsfeld*, EEOC Decision No. 04-60029, 2006 WL 1910448, at *2 (June 28, 2006).

1. One of the key "structural elements" of the CSRA is "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review." *Fausto*, 484 U.S. at 449 (citing 5 U.S.C. 7703). The original 1978 version of the CSRA "provided, as the general rule, that a federal employee should appeal a Board decision to 1 of the 12 Courts of Appeals or the Court of Claims." *Kloeckner*, 133 S. Ct. at 607 n.4; see Pub L. No. 95-454, 92 Stat. 1143-1144. Shortly thereafter, however, Congress realized the "'special need for nationwide uniformity' in certain areas of the law," and in 1982 it created the Federal Circuit "to provide 'a prompt, definitive answer to legal questions' in these areas." *United States* v. *Hohri*, 482 U.S. 64, 71-72 (1987) (quoting S. Rep. No. 275, 97th Cong., 1st Sess. 1-2 (1981) (1981 Senate Report)). One of those areas was federal employment law. See *Fausto*, 484 U.S. at 449. Since its creation, the Federal Circuit has been the default forum for judicial review of MSPB decisions. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 127, 144, 96 Stat. 37-38, 45.

Throughout its history, the Federal Circuit has reviewed nonappealability determinations in cases where no issue of discrimination has been raised (see, *e.g.*, *Manning* v. *MSPB*, 742 F.2d 1424, 1426, 1429 (1984)), and the CSRA provides no basis for suggesting that review of such decisions should instead be routed to a different court. Any review of an MSPB decision determining that a particular action *is* appealable would likewise take place in the Federal Circuit. The CSRA limits the government's ability to seek judicial review of an unfavorable MSPB determination, requiring that (except in a limited set of cases not directly relevant here) any such review be sought in the

Federal Circuit. See 5 U.S.C. 7703(d)(1) (permitting judicial review in certain circumstances at the request of the Director of the Office of Personnel Management).[4]

Congress would have no evident reason to vest the Federal Circuit with exclusive jurisdiction over all

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[4] In light of the text and structure of the CSRA, the government's view is that, in an assertedly mixed case in which the employee prevails on appealability but loses on other grounds and seeks review in district court, the government cannot contest the Board's appealability determination within that district-court action. Thus, the only circumstance in which a district court might address an appealability question would be if an employee files suit in district court when the MSPB has taken too long to decide his case. Under 5 U.S.C. 7702(e)(1)(B), if an employee appeals a case of discrimination to the Board, and the Board fails to decide it within 120 days, the employee may "file a civil action" under anti-discrimination law at that point. Although the CSRA describes the relevant district-court filing as "a civil action," 5 U.S.C. 7702(e)(1), rather than as a request for judicial review of an MSPB decision, see 5 U.S.C. 7703, the precedent in at least some circuits suggests that a district court in such a case would be empowered to review both the issue of discrimination and any underlying appealable action. See *Bonds* v. *Leavitt*, 629 F.3d 369, 378-380 (4th Cir.), cert. denied, 565 U.S. 941 (2011); *Seay* v. *Tennessee Valley Auth.*, 339 F.3d 454, 470-472 (6th Cir. 2003); *Doyal* v. *Marsh*, 777 F.2d 1526, 1535-1537 (11th Cir. 1985). To the extent that a district court has such authority, the court would have to decide whether the case actually involves an appealable action. But in that scenario, the court would not be reviewing any actual MSPB determination, and its decision would not necessarily preclude the MSPB from later reaching a different result in a similar case. Cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). In any event, a district court can avoid this situation entirely by opting to "stay the case, or hold it in abeyance, for a reasonable period of time" to allow the MSPB to issue a final decision. *Ikossi* v. *Department of Navy*, 516 F.3d 1037, 1043 (D.C. Cir. 2008) (citation omitted).

appealability determinations in nondiscrimination cases, plus employee-*favorable* appealability determinations in discrimination cases, while routing employee-*adverse* appealability determinations in discrimination cases elsewhere. Rules governing the appealability of employment actions are matters of general importance because they delineate the entire set of matters that the Board may consider. See, *e.g.*, 5 U.S.C. 7513(d) (allowing for appeal of certain personnel actions). The determination whether an action is appealable has additional important consequences because it may be tied to other procedural rights that an employee possesses. See 5 U.S.C. 7513(b) (specifying notice and process that are due when an employee is subjected to an action appealable to the Board under Section 7513(d)); see also *Garcia*, 437 F.3d at 1328 (explaining that "'mixed cases' are ordinary appeals of adverse agency actions that are accompanied by allegations of discrimination").

The CSRA's consolidation of review in the Federal Circuit "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an 'unnecessary layer of judicial review' in lower federal courts, and '[e]ncourages more consistent judicial decisions.'" *Fausto*, 484 U.S. at 449 (brackets in original) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 52 (1978)). Federal Circuit review of MSPB determinations of nonappealability in discrimination cases furthers all of those goals. It enables the MSPB to develop "a unitary and consistent Executive Branch position," *ibid.*, on appealability with a focus on only one body of judicial precedent. It also avoids an "unnecessary layer of judicial review," *ibid.* (citation

omitted), by eliminating the potential need for sequential review of an MSPB nonappealability determination by both a district court and a regional court of appeals. And it "[e]ncourages more consistent judicial decisions," *ibid.*, by consolidating review in one judicial forum.

2. A carve-out allowing district courts (and thus regional circuits) to decide appealability issues in a subset of cases would frustrate Congress's effort to harmonize the law. It would, in particular, perpetuate the very situation that the Federal Circuit's creation was designed to curtail, "in which the appellate courts reach inconsistent decisions on the same issue, or in which—although the rule of law may be fairly clear—courts apply the law unevenly when faced with the facts of individual cases." *Hohri*, 482 U.S. at 72 (quoting 1981 Senate Report 3). Under such an approach, courts could reach different conclusions on a variety of legal questions, including whether and when two shorter (nonappealable) suspensions may be treated as a longer (appealable) one, see *Synan* v. *MSPB*, 765 F.2d 1099, 1101 (Fed. Cir. 1985); whether and when a facially voluntary action can be appealed, see *Shoaf* v. *Department of Agric.*, 260 F.3d 1336, 1340-1342 (Fed. Cir. 2001); and whether and when an employee can appeal from an action arising out of a settlement of a grievance, see *Mays* v. *USPS*, 995 F.2d 1056, 1058 (Fed. Cir. 1993).

Those problems would be magnified by the Board's inability to determine ex ante which court's law will ultimately apply. Under petitioner's approach, the proper forum for judicial review would depend in part on the MSPB's resolution of the appealability question, since if the employee prevails, any review at the

government's behest would be in the Federal Circuit, see 5 U.S.C. 7703(d)(1). In addition, if the Board held that a particular action was not appealable, the employee might have a choice of several fora in which to pursue judicial review of that determination. Title VII, for example, permits an employee to bring suit in "any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice." 42 U.S.C. 2000e-5(f)(3).

3. Similar difficulties already exist, to some degree, with respect to issues of Board procedure. Because MSPB decisions dismissing mixed cases on procedural grounds are reviewed by district courts, see *Kloeckner*, 133 S. Ct. at 600, 607 & n.4, the Board may be subject to conflicting judicial rulings on procedural questions. But conflicts on procedural issues are more manageable for the Board than conflicts on appealability issues.

The procedures for appeals to the Board, such as the time within which the Board's review must be sought, are governed by regulations rather than statutes. See 5 U.S.C. 7701(a) ("Appeals shall be processed in accordance with regulations prescribed by the Board."); 5 C.F.R. Pt. 1201. Potential conflicts of authority therefore can generally be resolved by the Board itself through amendments to the relevant regulations. Cf. *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991) (observing that U.S. Sentencing Commission could "eliminate [a] circuit conflict" about

interpretation of Sentencing Guidelines through amendment).

Issues of appealability, in contrast, are principally governed by statute. See, *e.g.*, 5 U.S.C. 7512, 7513(d); *Kloeckner*, 133 S. Ct. at 600 n.1. The MSPB cannot definitively resolve conflicting judicial interpretations of those statutes. Even if the MSPB's interpretations of the relevant jurisdictional statutes are given deference, see note 2, *supra*, a court could still potentially reach a different conclusion, see *ibid.* (noting Federal Circuit's hesitation to defer to legal determinations about jurisdiction in MSPB adjudications); see also *Tunik* v. *MSPB*, 407 F.3d 1326, 1345 (Fed. Cir. 2005) (noting Board's view "that it lacks delegated authority to promulgate legislative rules determining the scope of its jurisdiction" and declining to address issue).

II. PETITIONER'S APPROACH TO JUDICIAL REVIEW IS UNSOUND

The MSPB determined that petitioner was not "affected by an action which [he] may appeal" to the Board. 5 U.S.C. 7702(a)(1)(A). See, *e.g.*, Pet. App. 30a (initial decision stating that this is "not a mixed case"); *id.* at 52a (initial decision finding no "appealable action"); *id.* at 52a n.9 (initial decision dismissing "for lack of jurisdiction"); see also *id.* at 21a (affirming initial decision as final decision). In accord with every other court of appeals that has addressed the issue, the court below held that judicial review of that determination belongs in the Federal Circuit, not in district court. See *id.* at 8a-15a; *Conforto*, 713 F.3d at 1115-1121; *Burzynski* v. *Cohen*, 264 F.3d 611, 620-621 (6th Cir. 2001); *Sloan*, 140 F.3d at 1261-1262; *Wall* v. *United States*, 871 F.2d 1540, 1543-1544 (10th Cir. 1989), cert. denied, 493 U.S. 1019 (1990); see also

McCarthy v. *Vilsack*, 322 Fed. Appx. 456, 458-459 (7th Cir. 2009) (per curiam), cert. denied, 558 U.S. 1116 (2010). Petitioner's contrary argument misconstrues the issue in this case, this Court's decision in *Kloeckner* v. *Solis*, *supra*, and the statutory review scheme for federal-employee complaints.

A. Judicial Review Of The MSPB's Nonappealability Determination Is Distinct From A Potential Trial On Petitioner's Discrimination Claims

In characterizing (Br. 28) the decision below as "subverting federal employees' statutory right to try their discrimination claims de novo in district court," petitioner misconceives the court of appeals' holding. The court did not hold, and the government does not contend, that petitioner is precluded from filing a de novo antidiscrimination lawsuit against his employing agency in district court. See *Conforto*, 713 F.3d at 1119 (explaining that Federal Circuit review of an MSPB decision finding an employment action nonappealable "does not deprive [the employee] of the right to a ruling on her discrimination claims"). The disputed issue instead concerns petitioner's *path* to district court.

1. Petitioner has asserted that his discrimination case is a mixed case in which he has a special right to seek MSPB review before filing a discrimination suit in district court. The MSPB has determined that it is not a mixed case and that petitioner therefore must exhaust his claim by filing an EEO complaint before proceeding to district court. The question presented is not whether petitioner can ultimately litigate his discrimination claim in district court. It instead concerns the proper forum for "judicial review" of "an MSPB decision" that he cannot invoke the Board's

"jurisdiction" on his way there. Pet. i; see Pet. App. 6a.

As petitioner recognizes, the CSRA distinguishes between "pure discrimination cases" on the one hand and "mixed cases"—*i.e.*, "cases involving both discrimination and serious civil-service claims"—on the other. Br. 15-16. Although each kind of case "goes to district court," Br. 16, only a mixed case may be presented to the MSPB, or administratively exhausted through such presentation, Br. 14-15; see pp. 5-10, *supra*. Pure discrimination cases must be exhausted through an EEO complaint to the employing agency, not through any procedure that involves the Board. See Pet. Br. 13; see pp. 6-7, *supra*. If petitioner simply wishes to litigate his discrimination claims in district court, he need not seek "judicial review" of "an MSPB decision" (Pet. i) at all. He can instead take advantage of the procedure set forth in 29 C.F.R. 1614.302(b), exhaust his claims through an EEO complaint, and file suit under the antidiscrimination laws without any prejudice from his failed attempt to seek Board review.

Alternatively, petitioner was entitled to Federal Circuit review of the MSPB's decision that his case is not a mixed case appealable to the Board. A favorable Federal Circuit ruling on that issue would benefit petitioner in two respects. First, it would provide him with an additional forum in which he might obtain relief (and from which the government's own appeal rights are limited). See 5 U.S.C. 7701, 7702(a)(1), 7703(d). Second, it would allow him to exhaust any civil-service claims—*i.e.*, any claims that the challenged personnel action was unlawful for reasons other than discrimination—and then, if necessary,

litigate those claims in district court along with his discrimination claims. See 5 U.S.C. 7702(a)(1); pp. 8-10, *supra*.

2. It is therefore irrelevant to the question presented here that district courts are the only Article III courts "in the business of trying discrimination claims de novo," Pet. Br. 1. The judicial review that petitioner seeks at this stage will not involve such a trial.

Under Section 7703(a)(1), an employee "adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." At this point, the "final order or decision of the [Board]" by which petitioner is "adversely affected or aggrieved" is the Board's decision dismissing petitioner's appeal on the ground that the underlying employment action is not appealable. The only issue before a court in "judicial review" of that decision would be the issue that the MSPB actually decided—*i.e.*, whether petitioner "has been affected by an action which [he] may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A).

If the reviewing court determines that petitioner has been affected by such an action, then he has a mixed case, which should be remanded to the Board for further proceedings in which it may decide the merits of his claims. See *Conforto*, 713 F.3d at 1120. If the reviewing court instead affirms the Board's non-appealability holding, petitioner must exhaust his discrimination claims through an EEO complaint and will *then* be entitled to seek a trial de novo on those claims in district court. See *ibid.*; Pet. Br. 13; p. 9, *supra*. Under no circumstances would a court exercising judicial review of the MSPB's decision resolve the

merits of petitioner's discrimination claims. It will instead decide only an appealability issue that is within the exclusive jurisdiction and competence of the Federal Circuit.

B. This Court's Decision In *Kloeckner* Does Not Support Petitioner's Position

Petitioner contends (*e.g.*, Br. 1-2) that this Court's decision in *Kloeckner* effectively answers the question presented in his favor. That argument lacks merit. To the extent that *Kloeckner* touches on the question presented, it undercuts petitioner's argument.

1. In *Kloeckner*, this Court considered the proper forum for judicial review of an MSPB decision dismissing an appeal to the Board as untimely under the Board's procedural regulations. 133 S. Ct. at 603. The Court held that, "when the MSPB dismisses an appeal alleging discrimination * * * on procedural grounds," the employee's petition for judicial review "should go to district court." *Id.* at 600. As the court of appeals in this case observed (Pet. App. 9a-10a), *Kloeckner*'s framing of the question presented as involving an MSPB dismissal on "procedural grounds" was repeated throughout the decision. See *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607.

The Court in *Kloeckner* emphasized that "[n]o one here contests that Kloeckner brought a mixed case—that she was affected by an action (*i.e.*, removal) appealable to the MSPB and that she alleged discrimination prohibited by an enumerated federal law." 133 S. Ct. at 604. The Court explained that, by satisfying those statutory criteria, the employee had "brought the kind of case that the CSRA routes * * * to district court," "[r]egardless whether the MSPB dismissed her claim on the merits or instead threw it out

as untimely." *Ibid.* The Court concluded that, "under the CSRA's terms," those statutory criteria are "all that matters." *Ibid.*

2. Here, by contrast, the MSPB determined that petitioner was *not* "affected by an action * * * appealable to the MSPB" and thus had *not* "brought the kind of case that the CSRA routes * * * to district court." *Kloeckner*, 133 S. Ct. at 604; see Pet. App. 20a-31a. Petitioner's reliance (Br. 15) on *Kloeckner* for the proposition that "a district court * * * is the proper forum for reviewing mixed cases arising from the MSPB, regardless of whether the MSPB reaches the merits of the discrimination claim," assumes that this is a mixed case. Unlike in *Kloecker*, that question is not only "contest[ed]" here, 133 S. Ct. at 604, but was decided adversely to petitioner by the administrative body charged with making such determinations.

Petitioner contends (Br. 19-20) that *Kloeckner* does not contemplate any distinction between Board determinations of nonappealability and Board procedural dismissals. He argues that, if the employee in *Kloeckner* was deemed to have been "'affected by an action which [she] may appeal' to the MSPB," even though the MSPB determined that "her appeal was time-barred," then he likewise was "'affected by an action which [he] may appeal to the [MSPB],'" even though the MSPB determined that the underlying action in his case was nonappealable. *Ibid.* (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). That is a false equivalency.

An action may be "appealable to the MSPB" even if "the MSPB * * * threw it out as untimely." *Kloeckner*, 133 S. Ct. at 604. An employee is "affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C.

7702(a)(1)(A), when he is subject to the *kind* of action that the MSPB is authorized to review, whether or not he satisfies the procedural requirements for Board review. "That statutory language draws attention to the contested 'action,'" focusing the inquiry on whether "the *action* affecting the employee is one she can appeal to the Board." Pet. App. 13a. The statute reiterates that focus by referring to "the appealable action," 5 U.S.C. 7702(a)(1), again framing the availability of an appeal as an attribute of the action itself, rather than as a function of the Board's own procedures.

That interpretation also harmonizes Section 7702(a)(1)(A) with Section 7701, which uses similar terminology—"may submit an appeal" and "action which is appealable"—in reference to the types of actions the Board may review, as distinct from the procedures under which the Board reviews them. Section 7701(a) states that an employee "may submit an appeal to the [Board] from any action which is appealable to the Board under any law, rule, or regulation," and separately provides that such an appeal "shall be processed in accordance with regulations prescribed by the Board." The Congress that used the terms "may submit an appeal" and "appealable" as exclusive of procedural considerations in Section 7701 is unlikely to have used nearly identical terms in the next section (Section 7702) as inclusive of procedural considerations. See, *e.g.*, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) ("[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citations and internal quotation marks omitted).

Consistent with that understanding, this Court has explained that the "availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue." *Elgin*, 567 U.S. at 12; see *id.* at 18 ("[T]he CSRA makes MSPB jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue."). And the Court has described review of an MSPB decision in district court under Section 7702(b)(2) as available in circumstances involving a "covered action," *id.* at 13, a term the Court used to refer to the kind of action that the MSPB is authorized to review, see *id.* at 6, 18.

The baseline appealability of an action is both formally and functionally distinct from whether an employee is procedurally barred from challenging it in a particular case. A nonappealable action was "never 'appealable to the MSPB.'" Pet. App. 13a. (quoting *Kloeckner*, 133 S. Ct. 604). In contrast, when an employee "brings her appeal in a procedurally deficient fashion—such as by bringing it too late— * * * the action itself was appealable." *Ibid.* Indeed, in the latter circumstance, the Board has authority to "excuse the procedural error and permit the appeal to go forward." *Ibid.*; see *id.* at 13a-14a (citing 5 C.F.R. 1201.12, 1201.22(c); *Conforto*, 713 F.3d at 1118 n.1).

3. Contrary to petitioner's suggestion (Br. 28), a distinction between MSPB determinations of nonappealability and MSPB procedural dismissals would not be "unworkable in practice." Petitioner analogizes that distinction to the more complicated question whether particular statutory requirements (such as filing deadlines) are "jurisdictional" or "procedural." See Br. 29 (citing, *inter alia*, *Henderson* v. *Shinseki*,

562 U.S. 428 (2011)). But applying the distinction here does not require any comparable inquiry into congressional intent. It instead requires only a reading of the MSPB's written opinion to determine whether the ground for dismissing the appeal was the nonappealability of the underlying personnel action (in which case any judicial review would be in the Federal Circuit) or instead a different ground (in which case any judicial review would go to district court).

The Board's decision here, for example, made clear that, "contrary to [petitioner's] contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it." Pet. App. 30a. The MSPB also informed petitioner that he could seek judicial review in the Federal Circuit. *Ibid.* Petitioner identifies no reason to believe that other Board decisions will be less clear. In any event, if the lack of clarity of a particular Board ruling led an employee to seek review in the wrong court, that court could transfer the case to the correct one, as the D.C. Circuit did here. See 28 U.S.C. 1631; Pet. App. 5a.

4. Petitioner also attempts to highlight asserted inconsistencies between the government's arguments in *Kloeckner* and in this case. That effort is misguided.

As petitioner observes (Br. 20), the government's merits brief in *Kloeckner* asserted that there was "no basis" for "a distinction" under which "MSPB dismissals of mixed cases on jurisdictional grounds are not subject to district court review under Section 7703(b)(2)," but "dismissals of such cases on procedural grounds are." U.S. Br. at 25 n.3, *Kloeckner*, *supra* (No. 11-184). The Court's subsequent decision in *Kloeckner*, however, demonstrates that this asser-

tion was incorrect. The Court explained that a procedural dismissal does not reflect any Board determination that the case is non-mixed, but a jurisdictional dismissal does. See *Kloeckner*, 133 S. Ct. at 604.[5]

Petitioner also observes (Br. 30) that the government's brief in opposition in *Kloeckner* asserted that "it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit." Br. in Opp. at 15, *Kloeckner*, *supra* (No. 11-184). The government does not now urge any such result. An employee who files an "untimely MSPB appeal" could obtain judicial review of the MSPB's procedural determination in district court, but she would not be entitled to "de novo review of her discrimination

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[5] At oral argument in *Kloeckner*, the government declined to concede that, if MSPB procedural dismissals in mixed cases are routed to district court, MSPB jurisdictional dismissals must be as well. See 10/2/12 Tr. at 25, *Kloeckner*, *supra* (No. 11-184). And Members of this Court noted reasons why the statute might require the two situations to be treated differently. See *id.* at 22 (observation by Justice Sotomayor that "the 7512 argument has more legs" because the "point is that you're only permitted to go to district court on issues of discrimination that are within the Board's jurisdiction"); *id.* at 23-24 (observation by Justice Kagan that "there does seem to be a good deal of difference between the question, what happens to something that is clearly a mixed case, and alternatively, the question of whether something is a mixed case; that is, whether it includes a claim about an action which the employee may appeal to the MSPB. And one could think that questions about what can be appealed to the MSPB ought to go to the Federal [C]ircuit under this statutory language in a way that questions that are involved in this case do not.").

claim" unless and until she exhausted her administrative remedies. Such an employee would thus have no practical advantage over "an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction," who would obtain judicial review of the Board's decision in the Federal Circuit, and who could then likewise "obtain de novo review of her discrimination claim" after exhausting administrative remedies. Indeed, the employee with the procedural dismissal would be at a disadvantage, because 29 C.F.R. 1614.302(b)'s provisions for restoring an employee to her ex ante position for purposes of pursuing a pure discrimination case apply only to MSPB jurisdictional dismissals, not to MSPB procedural dismissals.[6]

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[6] It is likewise unproblematic that, "because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [the jurisdiction/procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal." Pet. Br. 30 (brackets in original) (quoting Br. in Opp. at 15-16, *Kloeckner*, *supra* (No. 11-184)). An MSPB appeal that is both jurisdictionally and procedurally deficient may be routed to a different court for judicial review depending upon the precise ground the MSPB selects for its dismissal. But the judicial review would be review of the dismissal; the right to a trial de novo on the discrimination claims will depend on whether the employee has validly exhausted his administrative remedies. An employee would be disadvantaged by affirmatively seeking a procedural dismissal because Section 1614.302(b)'s reset provisions would be unavailable in that circumstance.

C. Petitioner Is Not Entitled To Disregard The MSPB's Decision And Insist On Treating His Case As Mixed For Purposes Of Judicial Review

Petitioner acknowledges (*e.g.*, Br. 21) that an employee alleging discrimination has no right to judicial review of an MSPB decision in district court unless he has been "affected by an action which [he] may appeal to the [Board]." 5 U.S.C. 7702(a)(1)(A). Petitioner contends (Br. 21), however, that so long as "the employee *claims* that he has been subjected to a personnel action sufficiently serious to warrant MSPB review," he may obtain district-court review of a contrary determination by the MSPB itself. That contention is unsound.

1. Petitioner's approach is at odds with the statutory text. Under the CSRA, an MSPB decision is reviewable in district court if the employee "*has been affected* by an action which the employee or applicant may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A) (emphasis added), and "*alleges* that a basis for the action was discrimination prohibited by" a listed anti-discrimination law, 5 U.S.C. 7702(a)(1)(B) (emphasis added). That language makes the employee's "alleg[ation]" sufficient as to discrimination but not as to appealability.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) (brackets omitted) (quoting *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997)). That presumption carries particular weight when, as here, the differing language appears in the "same sentence,"

Brown v. *Gardner*, 513 U.S. 115, 120 (1994); see *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (finding it "significant" that Congress used different language "two sentences" earlier).

Congress could have simplified the statute by placing the word "alleges" in a location where it would have applied to both criteria. It could, for example, have defined a mixed case as one in which an employee "alleges (A) an action which [he] may appeal * * * and (B) that a basis for the action was discrimination." The only discernible reason for the more complicated structure of the actual statutory text is to draw the very distinction—between the existence of an appealable action and the allegation of discrimination—that petitioner's interpretation elides. See, *e.g.*, *NLRB* v. *SW General, Inc.*, No. 15-1251 (Mar. 21, 2017), slip op. 10 (concluding that Congress did not intend interpretation that "it could easily have chosen clearer language" to implement).[7]

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[7] Petitioner does not substantially engage with the statutory text on this issue, and instead repeatedly cites *Kloeckner*'s statement that a "federal employee who claims that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court." Br. 22, 31-32 (emphasis omitted) (quoting 133 S. Ct. at 607). Any ambiguity in that statement is eliminated by the remainder of the Court's opinion, which adheres to the distinction drawn in the statutory text. See, *e.g.*, *Kloeckner*, 133 S. Ct. at 604 (defining relevant cases as "those appealable to the MSPB and alleging discrimination"); see also, *e.g.*, *id.* at 602 (explaining that a "removal from employment is appealable to the MSPB, * * * and Kloeckner believed the agency's action was discriminatory; she therefore now had a mixed case"). Petitioner's reliance (Br. 22) on potentially ambiguous language in the regulations is similarly misplaced: like the Court's opinion in *Kloeckner*, the regulations generally track the statutory language and do not attempt to redefine it. See, *e.g.*,

2. As petitioner explains (Br. 21-23), it is necessary as a practical matter to credit an employee's allegation of appealability at the "outset of a case," before the MSPB has had an opportunity to make a more definitive determination. Br. 22 (quoting *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995)). Doing so allows, for example, for compliance with any time limits that would apply if the employee's characterization of the case turns out to be correct. See Br. 26-27.[8] In the very case on which petitioner relies, however, this Court recognized that allegations necessary to establish jurisdiction may be contested and ultimately rejected by the tribunal. *Jerome B. Grubart, Inc.*, 513 U.S. at 537-538. And when those allegations are found to be legally or factually infirm, they are no longer controlling. See, *e.g.*, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 513-514 (2006) (explaining that district courts should dismiss for lack of subject-matter jurisdiction in such circumstances); 5B Charles Alan Wright et al., *Federal Practice and Procedure* § 1350 (3d ed. 2004) (same).

For purposes of the question presented here, petitioner identifies no sound reason why an employee's allegation that a particular personnel action is appealable to the Board should supersede the MSPB's own contrary determination. Under the rule that petition-

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29 C.F.R. 1614.302(a)(1) ("A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action *that can be appealed* to the [Board].") (emphasis added).

[8] The 120-day limit for the MSPB's resolution of a mixed case, 5 U.S.C. 7702(a)(1), "is only a timing requirement" and is not determinative of the proper forum for judicial review. *Kloeckner*, 133 S. Ct. at 606.

er advocates, although a suspension is typically appealable only if it exceeds 14 days, see 5 U.S.C. 7512(2), an employee's assertion that his one-day suspension actually lasted for a month would have dispositive weight. Petitioner appears to suggest that such a result could be avoided by requiring the employee's assertion of appealability to be "nonfrivolous," Br. 7, 22 (citations omitted), but that suggestion undercuts petitioner's entire argument. The statutory text provides no basis for distinguishing between MSPB determinations of nonappealability based on the strength of the employee's unsuccessful arguments. If an MSPB decision rejecting an employee's frivolous appealability arguments controls the choice of forum for judicial review, then an MSPB decision rejecting an employee's nonfrivolous (but mistaken) appealability arguments should as well.[9]

3. Petitioner alternatively contends (Br. 21) that judicial review of the MSPB's jurisdictional dismissal of his appeal belongs in district court "[b]ecause the MSPB indisputably had—and exercised—jurisdiction over this case." That contention, which concerns the

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[9] Petitioner may alternatively be suggesting that determinations of frivolousness would be made not by the MSPB, but instead by a district court. That is, he may be suggesting that an employee who claims to have a mixed case can seek review in district court, and that the district court can then transfer to the Federal Circuit any case in which it deems that claim to be frivolous. That cannot be what Congress intended. It is highly unlikely that the Federal Circuit would find the underlying action to be appealable in a case in which a district court has determined that an employee's appealability argument is frivolous. And Congress would not have designed a system in which the only MSPB nonappealability determinations in discrimination cases that are routed to the Federal Circuit are the ones *least* in need of judicial review.

correctness of the MSPB's decision, is irrelevant to the question presented, which concerns the *forum for judicial review* of that decision. It is also mistaken.

First, petitioner is wrong in suggesting (Br. 21) that the MSPB "exercise[s] jurisdiction" when it dismisses a case for a lack of jurisdiction. Not every action that an employee *tries* to appeal to the MSPB is "an action which [he] *may* appeal to the [MSPB]," 5 U.S.C. 7702(a)(1)(A) (emphasis added). An agency, like a court, "has jurisdiction to determine its own jurisdiction," *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002). See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49 (1938) (recognizing that, although agency "ha[d] jurisdiction only if the complaint concerns interstate or foreign commerce," agency was proper body to make initial jurisdictional determination); see also *Garcia*, 437 F.3d at 1331. "Unless the [agency] finds" that it has jurisdiction, the matter "must be dismissed." *Myers*, 303 U.S. at 49. Although some preliminary proceedings may be necessary to decide the jurisdictional question, the issuance of a jurisdictional dismissal means that the Board "never acquired jurisdiction." *Garcia*, 437 F.3d at 1331 (quoting *Cruz*, 934 F.2d at 1248). An MSPB decision that an employee *may not* appeal the underlying action thus does not amount to a decision that the employee "may appeal" the underlying action, 5 U.S.C. 7702(a)(1)(A).

Petitioner is likewise wrong in advancing the case-specific argument (Br. 23) that the MSPB exercised jurisdiction over his case by effectively deciding the merits of his claims in the course of determining that it lacked jurisdiction to consider them. In the context of an allegedly involuntary separation, "involuntari-

ness and discrimination" are "distinct issues" because "[c]oercion can be found without proof that the improper conduct was the product of discrimination, and discrimination can be found without proof that the discriminatory conduct was so serious as to compel the employee to resign." *Conforto*, 713 F.3d at 1120 (citing *Garcia*, 437 F.3d at 1341). In any event, to the extent that the particular appealability issue in this case (whether the underlying actions were voluntary) overlaps to some degree with the merits issue (whether the underlying actions were lawful), "[t]he necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351-352 (2011). It does not make the MSPB's jurisdictional determination in this case any less jurisdictional, or the underlying action any more appealable.

Petitioner also contends (Br. 27) that "on the facts of this case * * * there can be no question that [he] was subjected to a personnel action (a thirty-day suspension) sufficiently serious to trigger the Board's jurisdiction." That argument ignores the established rule that a suspension an employee accepts in settlement of a proposed harsher penalty, see Pet. App. 21a, "is normally considered a voluntary action over which the [B]oard has no jurisdiction," *Mays*, 995 F.2d at 1058. The MSPB accordingly determined that petitioner's suspension, like his retirement, could not be appealed to the Board. See Pet. App. 51a ("Because the parties entered into a settlement agreement and [petitioner] chose to settle the matter by agreeing to a lesser discipline and retirement, those courses of action are presumptively voluntary and therefore

divest the Board of jurisdiction over the underlying matter.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 1204(a) provides:

Powers and functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

2. 5 U.S.C. 7511 provides:

Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policymaking or policy-advocating character by—

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the Government Accountability Office;

(8) whose position is within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

3. 5 U.S.C. 7512 provides:

Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

4. 5 U.S.C. 7513 provides:

Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5. 5 U.S.C. 7701 provides:

Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, ad-

ministrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this

paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a

prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

6. 5 U.S.C. 7702 provides:

Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsec-

tion, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and—

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole—

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including—

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the

record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of—

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Com-

mission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

7. 5 U.S.C. 7703 provides:

Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) During the 2-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other

provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the

Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) During the 2-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit

or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

8. 29 U.S.C. 633a provides in pertinent part:

Nondiscrimination on account of age in Federal Government employment

* * * * *

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no

civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

* * * * *

9. 29 U.S.C. 794a(a)(1) provides:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

10. 42 U.S.C. 2000e-5(f) provides:

Enforcement provisions

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within

one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

11. 42 U.S.C. 2000e-16(c) provides:

Employment by Federal Government

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color,

religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

12. 5 C.F.R. 1201.56 provides in pertinent part:

Burden and degree of proof.

* * * * *

(b) *Burden and degree of proof—*

* * * * *

(2) *Appellant.* (i) The appellant has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), with respect to:

(A) Issues of jurisdiction, except for cases in which the appellant asserts a violation of his right to reemployment following military duty under 38 U.S.C. 4312-4314;

* * * * *

13. 29 C.F.R. 1614.302 provides:

Mixed case complaints.

(a) *Definitions*—(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information.

(b) *Election.* An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a

mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal.* (1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except

where it is alleged that § 1614.107(a)(4) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

RECORD
AND
BRIEF

FILED
APR 10 2017

No. 16-399

IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

It has been said of the Bourbon monarchs that, in the wake of the French Revolution, they learned nothing and forgot nothing. The same is true of the Government in the wake of *Kloeckner v. Solis*, 133 S. Ct. 596 (2012). Although this Court unanimously rejected the Government's position in that case, the Government once again trots out many of the same arguments, including those that this Court specifically considered and rejected in *Kloeckner*. Once again, this Court should reject the Government's position, which would make a hash of the text, structure, and purpose of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, and erect needless roadblocks on the path to the just and efficient adjudication of federal employees' employment-related claims.

The parties here disagree on what is necessary to make an employee's appeal to the Merit Systems Protection Board (MSPB) a so-called "mixed case," *i.e.*, a "[c]ase[] of discrimination subject to the provisions" of the CSRA, 5 U.S.C. § 7703(b)(2). Petitioner, applying the CSRA's text and traditional background pleading rules, contends that it depends on the employee's allegations. The Government, in contrast, contends that it depends on the Board's ultimate resolution of those allegations. As petitioner explained in his opening brief, the Government's position is just the sort of cart-before-the-horse approach that sensible jurisdictional rules are supposed to avoid. Furthermore, the Government's position is irredeemably circular, because the Board's resolution of those allegations is not, and is not meant to be, final. Rather, everyone

agrees that an employee seeking to pursue both a serious civil-service claim and a discrimination claim is entitled to judicial review of an adverse Board decision—the only question is whether that review should take place in district court or in the Federal Circuit. There is no basis in law or logic for the Government's theory that the Board's jurisdictional determination is conclusive of which court should review that very determination.

Indeed, the Government concedes—as it must—that the Federal Circuit *cannot* review a discrimination claim, because the CSRA expressly gives a plaintiff a right to a trial *de novo* (which may even involve a jury) on such a claim. Not to worry, says the Government: the discrimination claim will lie fallow in the Federal Circuit while that court reviews only the MSPB's jurisdictional determination. And if the Federal Circuit affirms the MSPB, the employee can start all over again by filing a new "pure" discrimination case subject to review in district court.

But that approach turns the whole statute upside down. Congress created a mechanism for federal employees to pursue "mixed" cases precisely so that they did not have to bifurcate their claims and proceed on two separate tracks. The Government's approach necessarily results in the very claim-splitting that the statute seeks to avoid. Congress certainly could have devised a scheme in which civil-service claims are reviewed in the Federal Circuit while discrimination claims are reviewed in district court. But, as this Court made clear in *Kloeckner*, that is not the scheme that Congress devised in the CSRA. To the contrary, that statute expressly

provides for an employee to pursue *both* serious civil-service claims *and* discrimination claims together in a single "case" subject to review in district court.

The Government insists, however, that this approach would subvert one of the CSRA's alleged major purposes: to foster the development of a uniform body of civil-service law in the Federal Circuit. But this Court rejected that very policy argument in *Kloeckner*. There is no question that mixed cases involving *substantive* civil-service issues (in which the Government presumably has the greatest interest in uniformity) are reviewed in district court—and thereafter, if warranted, in the regional circuits. Ditto, in light of *Kloeckner*, for mixed cases involving *procedural* civil-service issues. It is fanciful to suppose that Congress would have wanted to vest the Federal Circuit with exclusive authority to develop uniform *jurisdictional* civil-service law if it did not want to vest the Federal Circuit with exclusive authority to develop uniform *substantive* or *procedural* civil-service law. Indeed, as *Kloeckner* acidly noted, the whole "uniformity" argument is bogus because the Federal Circuit did not even exist when Congress enacted the CSRA in 1978. *See* 133 S. Ct. at 607 n.4. The Government's decision to peddle this argument once again represents a triumph of hope over experience.

Nor does the Government make any real attempt to address the practical problems inherent in its approach, including an employee's inability to know at the time of filing whether he has a mixed case subject to the CSRA's procedures, and the difficulty posed by determining whether a particular MSPB dismissal was indeed "jurisdictional," as opposed to

procedural or substantive, in nature. This case is a perfect example—the MSPB labeled its dismissal "jurisdictional" even though the Board's determination was clearly substantive: it concluded that petitioner had validly released his claims through a settlement. Thus, as explained below, the Government's position in this case is unsound as a matter of both text and policy.

ARGUMENT

MSPB Decisions Dismissing Mixed Cases Are Subject To Review In District Court.

A. The Government's Textual Arguments Are Unsound.

1. The Government's efforts to seize the mantle of textualism in this case are unavailing. As the Government notes, the "[c]ases of discrimination subject to the provisions of section 7702," which are subject to review in district court, 5 U.S.C. § 7703(b)(2), are cases that involve not only a discrimination claim but also a civil-service claim arising from "an action which the employee ... may appeal to the [MSPB]," *id.* § 7702(a)(1)(A). If the MSPB determines that the civil-service claim does *not* arise from "an action which the employee ... may appeal to the [MSPB]," *id.*, the Government says, then the case is not a mixed case subject to review in district court. U.S. Br. 18-26; *see also* Pet. App. 11a; *Conforto v. MSPB*, 713 F.3d 1111, 1118 (Fed. Cir. 2013). Rather, even though such a case concededly contains a discrimination claim but ostensibly lacks an appealable civil-service claim, the Government declares that the Federal Circuit is the exclusive forum for review. *See* U.S. Br. 18-26.

But that is not a textual argument at all. If the MSPB concludes that a particular civil-service claim is beyond its jurisdiction, all we know is that the MSPB has concluded that the claim is beyond its jurisdiction. That does not mean that the MSPB is correct. To the contrary, everyone agrees that MSPB decisions on jurisdictional issues, just like MSPB determinations on any other issues, are subject to review by an Article III court. The question here is *which* Article III court—a district court or the Federal Circuit? And that question, in turn, depends on whether the matter qualifies as a mixed case—the very issue on which the employee seeks judicial review.

According to the Government, the employee by definition has not brought such a case if the MSPB says so. The Government articulates this argument, which has no basis in the statutory text, in various ways. At times, the Government says that the MSPB's jurisdictional determination—even though it is subject to judicial review—"warrants deference." U.S. Br. 15; *see also id.* at 21 ("Treating the case as mixed, notwithstanding the MSPB's determination that it does not involve an appealable action, would be inconsistent with fundamental principles of deference to administrative decisions."). At other times, the Government says that "the MSPB's decision as to appealability should be treated as *presumptively* correct." *Id.* at 22 (emphasis added); *see also id.* at 15-16 ("Unless and until [the Board's jurisdictional determination] is reversed ... the mixed-case provisions ... are inapplicable."). And at other times, the Government suggests that the MSPB's determination is conclusive: "When the MSPB

determines that a discrimination case does not involve 'an action which the employee ... may appeal to the [Board],' 5 U.S.C. § 7702(a)(1)(A), the case *cannot be considered* a '[c]ase of discrimination subject to the provisions of section 7702,' 5 U.S.C. § 7703(b)(2)." U.S. Br. 21 (emphasis added); *see also id.* at 18 (employee seeking review of MSPB jurisdictional determination "cannot disregard the MSPB's determination of nonappealability.").

It is no surprise that the Government cannot settle on a single formulation of this "fundamental principle[]," U.S. Br. 21, because it is made up. It is one thing for courts, in appropriate circumstances, to defer to an agency *in the course of reviewing agency action*. *See, e.g., Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). But this case does not arise in the posture of judicial review of agency action. Rather, the question here is which court should review agency action in the first place. Congress did not leave a statutory gap with respect to which Article III court should review mixed cases, and even if it had, it is implausible that Congress intended to delegate to the Board the power to fill any such gap. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 227-30 (2001).

Because there is no basis for deferring to the Board's jurisdictional determination in assessing which court should review that very determination, the natural inference is that Congress meant for courts to follow the traditional background rule that the choice of forum is based on the complainant's allegations. *See* Petr. Br. 21-23 (citing, *inter alia*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Because petitioner *alleged* that (1) he was "affected by an action which [he] may appeal to the [MSPB]," and (2) "a basis for the

action was discrimination," 5 U.S.C. § 7702(a)(1)(A),(B), he brought a "[c]ase[] of discrimination subject to the provisions" of the CSRA, *id.* § 7703(b)(2), and may seek review of the Board's disposition of that case in district court. *See, e.g.*, *Elgin v. Department of Treasury*, 132 S. Ct. 2126, 2134 (2012) ("§ 7703(b)(2) demonstrates that Congress knew how to provide alternative forums for judicial review based on *the nature of an employee's claims*.") (emphasis added). The grounds for the Board's decision have no bearing on the forum for review of that decision, just as appeals from a federal district court decision dismissing a case for lack of diversity jurisdiction do not go to a *state* appellate court.

2. Not so fast, says the Government: the statute uses the verb "allege" only once, in connection with the discrimination component of a mixed case. *See* U.S. Br. 43 ("[A]n MSPB decision is reviewable in district court if the employee '*has been affected* by an action which [he] may appeal to the [MSPB],'" and '*alleges* that a basis for the action was discrimination.'") (quoting 5 U.S.C. § 7702(a)(1); emphasis added by Government). The Government then invokes the *expressio unius est exclusio alterius* canon, and argues that "Congress could have simplified the statute by placing the word 'alleges' in a location where it would have applied to both criteria." *Id.* at 43-44.

As this Court has often explained, however, the *expressio unius* canon is not such a blunt instrument. "'The force of any negative implication, ... depends on context.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 2017 WL 1050977, at *10 (Mar. 21, 2017) (quoting *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013)). Thus, "[t]he *expressio unius* canon applies only when 'circumstances support[] a sensible

inference that the term left out must have been meant to be excluded.'" *Id.* (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)).

Here, that inference would not be sensible at all. Subsection 7702(a)(1)(A) mirrors Section 7513(d), which provides that "[a]n employee against whom an action is taken under this section is entitled to appeal to the ... Board." Because the right to appeal granted by Section 7513(d) must be determined prior to the appeal itself—and thus cannot rationally depend on the outcome of the appeal—it necessarily must be grounded in the employee's factual allegations in presenting his case to the Board. It follows that the the same understanding should apply with respect to the similar language "action which the employee may appeal" in Subsection 7702(a)(1)(A), *i.e.*, that it is referring to actions that the employee alleges as the basis of his grievance. By contrast, Subsection 7702(a)(1)(B) does not track any other provision of the statute, and so the mere inclusion of the word "alleges" in that subsection but not in Subsection 7702(a)(1)(A) provides no basis to conclude that "Congress considered [whether jurisdictional allegations suffice under Subsection (a)(1)(A)] and meant to say no." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

Indeed, applicable regulations recognize this commonsense point, and define a "mixed case appeal" as "an appeal filed with the MSPB that *alleges* that an appealable agency action was effected, in whole or in part, because of discrimination ...." 29 C.F.R. § 1614.302(a)(2) (emphasis added); *see also Kloeckner*, 133 S. Ct. at 607 ("A federal employee who *claims* that an agency

action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court.") (emphasis added). In a footnote, the Government declares that "[p]etitioner's reliance on *potentially ambiguous* language in the regulations" and in *Kloeckner* is "misplaced," because those authorities "generally track the statutory language and do not attempt to redefine it." U.S. Br. 44 n.7 (emphasis added). But that attempt to dodge an on-point regulation and *Kloeckner* assumes that the statutory language clearly answers the question presented here in the Government's favor. As explained above, it does not, and the regulation and *Kloeckner* certainly suggest that the Government's interpretation of the statute is wrong.

3. Other provisions of the statute reinforce the point. An employee pursuing a mixed case, after all, may bypass the Board altogether. Instead, such an employee may pursue the case through his agency's Equal Employment Opportunity (EEO) office and then, if still aggrieved, proceed directly to district court, which may consider *both* the employee's civil-service and discrimination claims. *See* 5 U.S.C. § 7702(a); 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b); *see generally Kloeckner*, 133 S. Ct. at 601. Because the Board need not address a mixed case at all, it cannot be that a jurisdictional determination by the Board is either necessary or sufficient for a mixed case to exist. *See* Petr. Br. 26.[1]

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[1] The Government asserts that "[a]n employee who chooses th[e] path [of pursuing a mixed case through her agency EEO office rather than the MSPB] is bypassing the opportunity to

An employee pursuing a mixed case may also bypass the Board (or the agency) and proceed directly to district court if the Board (or the agency) does not resolve the case within 120 days. *See* 5 U.S.C. §§ 7702(a)(1),(2), (e)(1); *see generally* U.S. Br. 28 n.4. Under the Government's interpretation, however, there is no way to know whether a case is "mixed" (and thus the 120-day clock triggered) unless and until the Board ultimately so determines. So the Government concocts an *ad hoc* solution, declaring that "it is necessary as a practical matter to credit an employee's allegations of appealability at the outset of a case, before the MSPB has had an opportunity to make a more definitive determination." U.S. Br. 45 (internal quotation omitted). Those allegations "are no longer controlling," the Government asserts, if the MSPB rejects them. *Id.*

But that assertion misses the point: under the Government's position, there is no way to know whether the 120-day clock is triggered at all unless and until the Board has ruled. *See* Petr. Br. 26-27. And the Government never explains what happens to a pending district-court action if the Board determines after the 120-day deadline that the alleged civil-service action was not appealable and hence (under the Government's view) the case was

---

present civil-service claims to the MSPB, *and instead opting to focus solely on her discrimination claims*." U.S. Br. 7-8 (emphasis added). The italicized portion of that sentence, which is unsupported by any citation, is manifestly incorrect. The CSRA expressly authorizes federal employees to pursue mixed cases through their agency, with review in district court, without giving up their civil-service claims. *See* 5 U.S.C. §§ 7702(a)(2), (e)(1)(A), 7703(b)(2).

never a mixed case at all. Because the coherent operation of Section 7702 requires a focus on the employee's allegations, not the MSPB's ultimate conclusions, those allegations, rather than those conclusions, determine whether a case is a "[c]ase[] of discrimination subject to the provisions of section 7702" that is reviewable in district court. 5 U.S.C. § 7703(b)(2). Here, as in *Kloeckner*, the Government's contrary "textual" argument "is a contrivance, found nowhere in the statute's provisions on judicial review." 133 S. Ct. at 604.

B. The Government's Policy Arguments Are Unsound.

1. Presumably recognizing the weakness of its textual arguments, the Government devotes the bulk of its brief to advancing a policy argument: that "Congress created [the Federal Circuit] in part to serve as the centralized forum" for reviewing issues relating to MSPB jurisdiction. U.S. Br. 15; *see also id.* at 18 ("[T]he Federal Circuit ... was created in part to centralize the law governing appealable actions and ... has exclusive authority to review all MSPB appealability determinations."). According to the Government, the CSRA reflects a "structural preference for 'the primacy of the United States Court of Appeals for the Federal Circuit for judicial review'" of MSPB decisions generally, *id.* at 16 (quoting *United States v. Fausto*, 484 U.S. 439, 449 (1988)), and for "exclusive Federal Circuit review of MSPB nonappealability determinations in discrimination cases" in particular, *id.* at 26 (capitalization modified).

That policy argument is yet another contrivance. It is certainly true that, as a general matter, Congress has given the Federal Circuit "'primacy'" in reviewing MSPB decisions. U.S. Br. 5, 16, 27 (quoting *Fausto*, 484 U.S. at 449); *see generally* 5 U.S.C. § 7703(b)(1)(A). But the CSRA carves out an important exception to that general rule: it vests the district courts, not the Federal Circuit, with exclusive jurisdiction to review MSPB decisions in cases involving both serious civil-service claims and discrimination claims. *See* 5 U.S.C. § 7703(b)(2). And, as the Government grudgingly but necessarily concedes, *see* U.S. Br. 10, such district-court review extends not only over the discrimination claims, but over the whole "case," including the civil-service claims, *see, e.g.*, *Kloeckner*, 133 S. Ct. at 607 n.4; *Sher v. United States Dep't of Veterans Affairs*, 488 F.3d 489, 499 (1st Cir. 2007) (collecting cases).

Because the CSRA vests district courts with exclusive authority to review MSPB decisions in cases involving serious civil-service claims as well as discrimination claims, the Government does not (and cannot) argue that Congress gave the Federal Circuit exclusive authority to develop a uniform body of *substantive* civil-service law. Nor, in light of *Kloeckner*, can the Government argue that Congress gave the Federal Circuit exclusive authority to develop a uniform body of *procedural* civil-service law. Thus, the Government is reduced to arguing that the Congress gave the Federal Circuit exclusive authority to develop a uniform body of *jurisdictional* civil-service law. But it beggars belief to suppose that, as a policy matter, Congress was fine with having district courts develop substantive and

procedural civil-service law but drew the line at jurisdictional civil-service law.[2] Indeed, that suggestion gets matters backwards: if anything, substantive and procedural civil-service law tends to implicate discretionary policy concerns far more than jurisdictional civil-service law, which is largely a creature of statute. And, of course, decisions by the district courts are reviewable by the regional circuits and ultimately by this Court, which provides the ultimate forum for ensuring uniformity on all of these various issues (as on all other issues of federal law).[3]

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[2] In a futile attempt to salvage the coherence of its "uniformity" theory, the Government disclaims its own ability to "contest the Board's appealability determination" in "an assertedly mixed case in which the employee prevails on appealability but loses on other grounds and seeks review in district court." U.S. Br. 28 n.4. But the Government identifies no textual basis for that disclaimer. Again, this sort of *ad hoc* response underscores, but does not solve, the manifest analytical flaws in the Government's theory.

[3] In passing, the Government also suggests a potential uniformity problem posed by a CSRA provision authorizing the Director of the Office of Personnel Management to seek Federal Circuit review of an adverse MSPB decision in extraordinary circumstances. *See* U.S. Br. 27-28, 29, 30-31 (citing 5 U.S.C. § 7703(d)(1)). Under that provision, "[t]he Director may obtain review of any final order or decision of the Board by filing ... a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d)(1). "The granting of the petition for judicial review shall be at the discretion of the

In any event, the Government's uniformity arguments here are a reprise of the uniformity arguments it advanced unsuccessfully in *Kloeckner*:

- *Compare*: "One of the key structural elements of the CSRA is the primacy of the United States Court of Appeals for the Federal Circuit for judicial review." U.S. Br. 27 (internal quotation omitted);

  With: "[O]ne of the primary structural elements of the CSRA is the primacy of the Federal Circuit as the forum for judicial review." U.S. *Kloeckner* Br. at 14, 2012 WL 2883261, at *14.

- *Compare*: "[C]onsolidation of review in the Federal Circuit enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an unnecessary layer of judicial review in lower federal courts, and encourages more consistent judicial decisions." U.S. Br. 29 (internal quotation omitted);

Court of Appeals." *Id.* But that argument proves nothing. The existence of this extraordinary, and discretionary, procedure for review of *any* MSPB decision does not negate the general statutory directive giving district courts exclusive jurisdiction over mixed cases. *See id.* § 7703(b)(2). Regardless of whether the discretionary review provision, if successfully invoked in a mixed case, would override the statutory directive for district-court review, it certainly does not prove that employee appeals in mine-run mixed cases—whether dismissed on substantive, procedural, or jurisdictional grounds—belong in the Federal Circuit.

With: "Channeling review of such matters to the Federal Circuit ... enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an unnecessary layer of judicial review in lower federal courts, and encourages more consistent judicial decisions." U.S. *Kloeckner* Br. at 32-33, 2012 WL 2883261, at *32-33 (internal quotation omitted).

- *Compare*: "[A]llowing district courts (and thus regional circuits) to decide appealability issues" in mixed cases "would frustrate Congress's effort to harmonize the law [and thereby] perpetuate the very situation that the Federal Circuit's creation was designed to curtail." U.S. Br. 30;

  With: "Allowing the district courts and the regional courts of appeals throughout the country to review MSPB decisions would undermine the consistency of interpretation by the Federal Circuit envisioned by § 7703 of the Act." U.S. *Kloeckner* Br. at 33, 2012 WL 2883261, at *33 (internal quotation omitted).

The *Kloeckner* Court soundly rejected this uniformity argument. As the Court explained, "the Government's own approach would leave many cases involving federal employment issues in district court" because district courts may review substantive civil-service issues in mixed cases. *Kloeckner*, 133 S. Ct. at 607 n.4. (And that point is even more compelling post-*Kloeckner*, as district courts now may review procedural as well as substantive civil-

service issues.) Moreover, the Government's uniformity argument "runs into an inconvenient fact": "When Congress passed the CSRA, the Federal Circuit did not exist, and § 7703(b)(1) thus provided, as the general rule, that a federal employee should appeal a Board decision to 1 of the 12 Courts of Appeals or the Court of Claims." *Id.* Finally, the Court noted, "even the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text." *Id.* In light of this stinging rebuke, it is surprising that the Government has chosen to double down on the same uniformity argument in this case.

2. In sharp contrast to the Government's *faux* policy argument, the statutory text highlights a *real* policy argument: Congress wanted to allow federal employees to take their discrimination claims to district court, where those claims are subject to *de novo* review, without forcing the employees either to forfeit related civil-service claims or to litigate twice. Congress obviously concluded that the potential cost of some (presumably temporary) disuniformity in federal civil-service law was more than outweighed by the twin benefits of (1) ensuring a forum for *de novo* litigation of discrimination claims, and (2) avoiding the inconvenience and expense of forcing federal employees to split their claims.

Although the entire purpose of authorizing mixed cases is to prevent the need for claim-splitting, the Government ignores that purpose and essentially argues that the CSRA not only *allows* but *requires* claim-splitting. Thus, the Government concedes that the Federal Circuit cannot adjudicate discrimination claims. *See* U.S. Br. 16. But that is no problem, the

Government asserts, because the Federal Circuit can adjudicate the civil-service jurisdictional issue while the discrimination claim remains in limbo. *See id.* ("The judicial review ... transferred to the Federal Circuit is not review of petitioner's *discrimination claims*, which he will be able to file in district court once he has exhausted them administratively. It is instead review of the discrete question whether the MSPB should have entertained his appeal.") (emphasis in original); *see also id.* at 23 (same); *Ballentine v. MSPB*, 738 F.2d 1244, 1246-48 (Fed. Cir. 1984) (same). And, the Government says, no big deal if the Federal Circuit affirms the Board on the civil-service jurisdictional issue: the employee can just go back to square one and file an entirely new "pure" discrimination claim with his agency's EEO office. *See, e.g.*, U.S. Br. 15, 18, 23, 25, 33, 35. Indeed, the Government declares, there are tolling mechanisms in place to ensure that the employee does not lose the discrimination claim under these circumstances. *See id.* at 9, 23, 25.

But this is all an attempt to rationalize a claim-splitting regime, which is *not* the regime that Congress enacted in the CSRA. To be sure, an employee can always abandon a civil-service claim and pursue a "pure" discrimination claim. But the Government's repeated allusion to that scenario, *see, e.g.*, U.S. Br. 15-16, 18, 23, misses the point. The system does not *require* an employee to relinquish a civil-service claim to preserve the right to pursue a discrimination claim in district court. To the contrary, the system is set up to allow the employee to pursue both claims simultaneously in a single case. Unlike the Federal Circuit, a district court can

adjudicate *both* civil-service claims *and* discrimination claims, *see* Petr. Br. 17 n.*, which is why Congress sensibly decided to route appeals in cases involving both types of claims to district court.

The Government suggests, however, that allowing an employee to appeal the MSPB's jurisdictional dismissal of an alleged mixed case to district court would effectively allow the employee to game the system by filing frivolous cases in the MSPB and thereby evade the statutory exhaustion requirement for discrimination claims. *See* U.S. Br. 12-13, 15-16, 34, 41-42. That suggestion is meritless. As noted above, an aggrieved employee can exhaust serious civil-service claims and discrimination claims by filing a mixed case *either* with the MSPB, *see* 5 U.S.C. § 7702(a)(1), *or* with the agency's EEO office, *see id.* § 7702(a)(2). Either route provides the necessary exhaustion of the claims, and neither route represents an evasion of the other.

If the employee chooses to file a mixed case with the MSPB, but the Board declines to hear the case on jurisdictional grounds, the employee cannot be faulted for failure to exhaust. Rather, the employee may appeal the MSPB's dismissal of the claim to district court. If the district court reverses the MSPB's dismissal of the case, the court would then—by the Government's own admission, *see* U.S. Br. 35—remand for the Board to address the entire case (including both the serious civil-service claims and the discrimination claims) in the first instance. It is far-fetched at best to suggest that an employee would seek to avoid an internal agency exhaustion requirement (which is hardly onerous) through the subterfuge of filing a "pure" discrimination claim as

an ersatz mixed case before the MSPB (*e.g.*, by "assert[ing] that [a] one-day suspension actually lasted for a month," *id.* at 46), and then appealing a jurisdictional dismissal of the case to district court (where the employee would face Rule 11 sanctions if he made factually or legally baseless allegations, and would at best wind up back before the Board). That is akin to suggesting that someone would choose to avoid the burden of walking down the block by instead running a marathon.[4]

3. In the final analysis, the most remarkable thing about the Government's extensive policy discussion is not so much what it says, but what it does *not* say. Although the Government insists that its position "makes sound practical sense," U.S. Br. 16, its position would put dispositive weight on elusive jurisdiction/procedure/substance distinctions, and thus would require litigants and courts to determine whether the MSPB actually dismissed the case on jurisdictional grounds, on the one hand, or procedural or substantive grounds, on the other.

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[4] Contrary to the Government's suggestion, petitioner does not "suggest" that an employee's jurisdictional allegations are controlling only if "nonfrivolous." *See* U.S. Br. 46. Such a limitation makes sense in the analogous context of federal jurisdiction, *see, e.g.*, *Bell*, 327 U.S. at 682-83, since a litigant could seek some substantive or procedural advantage by a frivolous invocation of federal jurisdiction. But, as explained in the text, an employee has nothing to gain by a frivolous invocation of MSPB jurisdiction, so there is no reason to complicate matters by carving out such an exception in this context.

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As the Government explained in *Kloeckner*, such a distinction "has no basis" in the statute, and would be "difficult and unpredictable" to apply in practice. U.S. *Kloeckner* Br. at 25 n.3, 2012 WL 2883261, at *25 n.3; Br. for Resp. in Opp. at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted). It is hard to make the point any better than the Government did there:

> [A]s a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [a jurisdiction/procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

Kloeckner Br. for Resp. in Opp. at 15-16, 2011 WL 6281813, at *15-16. The Government responds to its dramatic shift in position with a terse but epic understatement: "The government does not now urge any such result." U.S. Br. 41.

Contradicting its position in *Kloeckner*, the Government now insists that applying jurisdiction/procedure/substance distinctions in this context will be easy because litigants and courts will

be bound by whatever label the MSPB places on its decision. Thus, determining whether the Board dismissed on jurisdictional, procedural, or substantive grounds "requires only a reading of the MSPB's written opinion to determine whether the ground for dismissing the appeal was the nonappealability of the underlying personnel action (in which case any judicial review would be in the Federal Circuit) or instead a different ground (in which case any judicial review would go to district court)." U.S. Br. 40.

But just because the MSPB *labels* a dismissal jurisdictional does not mean that it *is* jurisdictional. Were that the case, the MSPB could label any decision rejecting a claim on procedural or substantive grounds "jurisdictional" and thereby ensure review in the Federal Circuit. The law, however, focuses on *substance*, not *labels*. *See, e.g.*, *Fry v. Napoleon Comm. Schs.*, 137 S. Ct. 743, 755 (2017); *Evans v. Michigan*, 133 S. Ct. 1069, 1076 (2013). If the law does not treat the label that an *Article III court* places on its action as conclusive, *see, e.g.*, *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 646 (1988), there is no basis for treating the label that an *administrative agency* places on its action as conclusive.

Indeed, MSPB decisions are often less than a model of clarity on this score. This case is a perfect example: the Board's decision here, while ostensibly "jurisdictional," resolved the critical substantive issue in the case: whether petitioner validly released all of his claims through a settlement. The voluntariness of petitioner's settlement agreement is not remotely a "jurisdictional" issue. *See* Petr. Br.

27-28. In addition, the MSPB treats some deadlines as "jurisdictional" and others as "procedural." *Compare Ballentine*, 738 F.2d at 1248 (jurisdictional) *with Kloeckner*, 133 S. Ct. at 604 (procedural). Whether a timeliness issue is properly characterized as jurisdictional or procedural is a difficult and somewhat metaphysical question, *compare Bowles v. Russell*, 551 U.S. 205, 209-11 (2007) *with id.* at 215-20 (dissenting opinion), and surely beyond the ken of the average *pro se* litigant.

And the Government provides no clue of what happens when the Board rules on alternative grounds, one of which is jurisdictional and another either procedural or substantive. *See, e.g.*, *Davenport v. U.S. Postal Serv.*, 97 M.S.P.R. 417, 417 (2004). The Government is similarly mum on what happens when the Board, addressing a case that encompasses multiple claims, dismisses some on jurisdictional grounds and others on substantive or procedural grounds. *See, e.g.*, *Donahue v. U.S. Postal Serv.*, No. 2:05-CV-04998, 2006 WL 859448, at *1 (E.D. Pa. Mar. 31, 2006). It is thus no surprise that nothing in the statutory text creates any dispositive distinction between MSPB dismissals on jurisdictional, procedural, or substantive grounds, because any such distinction would be both nonsensical and unworkable.

* * *

The Federal Circuit put the law on this misguided path over thirty years ago in *Ballentine* by rejecting the *Government's* request to transfer a mixed case dismissed by the Board on jurisdictional grounds to district court. *See* 738 F.2d at 1245-48. *Ballentine*

held that "procedural or threshold matters, not related to the *merits* of a discrimination claim before the MSPB, may properly be appealed to this court." *Id.* at 1247 (emphasis added). This Court unanimously repudiated that holding in *Kloeckner*, but the *ancien regime* has not yielded gently. It is now time for this Court to eradicate *Ballantine* root and branch, and to clarify that mixed cases are subject to review in district court.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment.

April 10, 2017

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

BRIEF OF *AMICUS CURIAE* METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION (MWELA) IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Metropolitan Washington Employment Lawyers Association (MWELA), submits this *amicus curiae* brief with the consent of the parties,[1] in support of Petitioner's argument that mixed cases dismissed by the Merit Systems Protection Board (MSPB) on jurisdictional grounds are entitled to *de novo* review in federal district court. MWELA has been at the forefront of advocacy before the courts to achieve equal employment opportunity for men and women from diverse communities and to uphold essential protections against workplace discrimination. MWELA seeks to ensure that laws passed by Congress, attempting to secure equal employment opportunity, are interpreted consistent with the plain language of the statute, in conformity with the law's purpose and legislative intent. This case, involving the right to have discrimination claims brought by federal employees heard *de novo* in federal district courts when the discrimination claim has been dismissed on jurisdictional grounds, is a matter of significant concern to MWELA and will directly affect the rights of those they serve.

MWELA, a professional association of over 330 attorneys, is the local affiliate of the National Employment

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amicus*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2 and 37.3(a), the Petitioner's universal consent has been filed with the Clerk of the Court. The Respondent consented to the filing of this brief in a letter dated March 1, 2017.

Lawyers Association (NELA), the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes. MWELA's members represent numerous federal government employees, generating the interest in the issues raised by this case.

MWELA respectfully submits this *amicus* brief to aid the Court in addressing whether a MSPB decision disposing of a "mixed" case appeal on jurisdictional grounds is subject to judicial review in federal district court or in the U.S. Court of Appeals for the Federal Circuit.

The disposition of this issue will have an important effect on the ability of federal employees to enforce their statutory rights to bring discrimination complaints in the federal sector administrative process under the Civil Service Reform Act of 1978 (CSRA). For these important reasons, MWELA respectfully submits this *amicus* brief.

SUMMARY OF ARGUMENT

The legislative history of the Civil Service Reform Act of 1978 (CSRA), PUB. L. NO. 95-454, 92 Stat. 1211 (codified in scattered sections of 5 U.S.C.), sound public policy, and the plain language[2] of the Act dictate that a federal employee alleging workplace discrimination

[2] The plain language of the statute is discussed in detail at pages 12-17 of the Brief for Petitioner.

has an unqualified right to seek trial *de novo* in federal district court after *any* final order or decision by the MSPB.

The CSRA, as a whole, is not the clearest of statutes. It is replete with complicated procedural requirements that often frustrate federal employees who seek to vindicate their rights without the aid of experienced counsel. As the Court noted in *Kloeckner v. Solis*,

> the intersection of federal civil rights statutes and civil service law has produced a complicated, at times confusing, process for resolving claims of discrimination in the federal workplace. But even within the most intricate and complex systems, some things are plain . . . . [such as] where two sections of the CSRA, read naturally, direct employees like [Perry] to district court.

Kloeckner v. Solis, 133 S. Ct. 596, 603 (2012). Similarly, on the narrow issue presented here, the language of the statute and its intent is clear. The CSRA provides that once the MSPB has disposed of a federal employee's mixed claim, that employee may seek trial *de novo* in federal district court for his discrimination claim, regardless of the nature of the dismissal.

The legislative history of the CSRA confirms that Congress intended for mixed cases appealed from the MSPB to have *de novo* review in federal district court. Both the House and the Senate stressed the absolute right of *de novo* review in district court for discrimination claims, recognizing that such claims are

best adjudicated in district court. Significantly, in drafting the Federal Courts Improvement Act of 1982, PUB. L. NO. 97-164, Congress left intact the district courts' authority to adjudicate federal employees' employment discrimination claims.

Furthermore, sound public policy necessitates that mixed cases appealed from the MSPB should go before a federal district court. The federal district courts have been handling discrimination claims for nearly half a century. The district courts understand the complexities of such cases and are adept at addressing the procedural intricacies they present. Denying access to trial *de novo* in a district court for claims dismissed by the MSPB on jurisdictional grounds would unfairly punish employees for failing to navigate the "procedural maze," and incentivize employees to bypass the administrative procedures set up by Congress in the CSRA altogether. This interpretation would create the absurd outcome of denying any merits hearing to mixed case discrimination claims, depending whether the MSPB finds jurisdiction.[3]

Finally, a plain reading of the CSRA places jurisdiction for mixed case[4] appeals in federal district court.

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[3] This troubling result can be avoided in part through proper integration of Equal Employment Opportunity Commission (EEOC) administrative hearings into the process under 29 C.F.R. § 1614.302, as discussed in greater detail *infra* Section III.

[4] Mixed cases are those cases in which an employee claims both unlawful discrimination and a related "adverse employment action." *See Kloeckner*, 133 S. Ct. at 601 (citing 29 C.F.R. § 1614.302).

See Kloeckner, 133 S. Ct. at 607 n.4. The statute expressly directs that all mixed cases must be filed under applicable anti-discrimination statutes. 5 U.S.C. § 7703. The statutes referenced in the CSRA place jurisdiction for discrimination cases in federal district courts.[5] *See, e.g.*, 42 U.S.C. § 2000e-5(f)(3). The CSRA provides that when federal employees allege unlawful discrimination as a basis of an appealable action, their claims constitute "cases of discrimination" within the jurisdiction of the district court. *Cf.* 5 U.S.C. §§ 7702(a)(1)(B), 7703(b)(2). Once the MSPB has issued any final order or decision in the action, the case becomes a judicially reviewable action provided that the EEOC/Special Panel review process is not invoked. *See* 5 U.S.C. § 7702(a)(3). A MSPB dismissal on jurisdictional grounds constitutes a final order, which can and should be reviewed in district court. *See* 5 U.S.C. §§ 7702(a)(3), 7703(b)(2). The Court's reasoning in *Kloeckner* applies just as strongly whether the MSPB's decision is on procedural or jurisdictional grounds.

Given the Court's reasoning in *Kloeckner*, the correct resolution of this petition is clear. The Court should find that *de novo* review is available in federal district court for any federal employee whose mixed case has been dismissed on jurisdictional grounds by the MSPB.

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[5] The jurisdiction of the federal district courts is not exclusive. Under the Court's decision in *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 821 (1990), cases can be filed in state trial courts that have the ability to hear the case *de novo*.

ARGUMENT

I. THE CSRA'S LEGISLATIVE HISTORY CONFIRMS THE CONGRESSIONAL INTENT TO SAFEGUARD THE RIGHT OF A FEDERAL EMPLOYEE ALLEGING WORKPLACE DISCRIMINATION TO SEEK TRIAL *DE NOVO* IN FEDERAL DISTRICT COURT.

The CSRA's legislative history confirms Congress' intent that mixed case appeals from the MSPB should be adjudicated in federal district court. In passing the CSRA, Congress sought to make the federal government more efficient by streamlining disciplinary procedures,[6] while simultaneously protecting federal employees' interests in cases of discrimination by ensuring a right to seek trial *de novo* in district court after agency action. Subsequent amendments to the CSRA in 1982, which established the Federal Circuit and simplified the process of judicial appeals of MSPB and EEOC actions, left intact the original 1978 provisions providing district courts with the jurisdiction to review discrimination claims by federal employees.

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[6] Objectives of the proposed reforms included "[t]o reduce the red tape and costly delay in the present personnel system" as well as "[t]o promote equal employment opportunity." H.R. REP. NO. 95-1403, at 99 (1978). The Senate Committee on Government Affairs echoed those contrasting concerns in its report when it called the civil service system "an outdated patchwork of statutes and rules" and addressed the need to "[a]llow civil servants to be able to be hired and fired more easily, *but for the right reasons*." S. REP. NO. 95-969, at 3, 4 (1978) (emphasis added).

A. The legislative history of the CSRA stressed the importance of the right of federal employees to have a hearing on the merits of discrimination claims.

Throughout deliberations on the CSRA, two points emerged: Congress intended to ensure fair hearings of federal-sector employment discrimination complaints, and these hearings were to be *de novo* in federal district court. One of the managers of H.R. 11280, Representative William D. Ford, reiterated an employee's right to a hearing on the merits: "[T]itle II of the act . . . sets forth procedures for disciplining and discharging employees. . . . [T]he employee has an absolute statutory right to a hearing, unless he or she waives that right." Remarks of Rep. William D. Ford, 124 CONG. REC. H13, 610 (Daily Edition, October 14, 1978), reprinted in H. COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, Comm. Print No. 96-2 vol. 2, at 2014 (1979); *see* H.R. 11280, 95th Cong. (1978). Another manager, Representative William Clay, stressed that the "testimony from over 40 witnesses . . . was overwhelmingly in support of the thrust of the [proposed] legislation because the existing program was . . . lacking in the opportunity for judicial review of decisions of the Federal labor relations council." 124 CONG. REC. H8466 (Sept. 11, 1978). Representative Clay's remarks underscore that the need to ensure judicial review was one of the reasons why Congress undertook reform of civil service disciplinary procedures in 1978.

During the consideration of the CSRA, Representative Clay offered an amendment "at the request of the Equal [Employment] Opportunity Commission" to ensure "that a trial *de novo* remains available to complainants in discrimination cases." The House accepted the amendment after only limited debate. 124 CONG. REC. H9364 (Sept. 11, 1978); *see also* 124 CONG. REC. H9381-2 (Sept. 11, 1978). Thus, Congress understood and intended the CSRA to guarantee a merits hearing for claims arising from adverse actions based on unlawful discrimination.

B. Congress gave district courts jurisdiction to review discrimination complaints by federal employees because district courts have expertise in fact-finding and in adjudicating civil rights matters.

In their drafting and debate of the CSRA, both the House and Senate agreed that the district court is the appropriate forum to review mixed case appeals from the MSPB. When the Senate Committee on Governmental Affairs recommended S. 2640, which ultimately became law, the Committee explained that administrative decisions on discrimination claims should undergo review by federal district courts, rather than courts of appeals, because "[d]istrict court is a more appropriate place than the Court of Appeals for [review of administrative decisions on discrimination] cases since they may involve additional fact-finding." S. REP. NO. 95-969 at 63 (1978). Moreover, district courts already consider discrimination complaints from the private

sector. S. REP. NO. 95-969, at 63 (1978). Because of their extensive consideration of discrimination complaints, the district courts have special expertise in matters of employment discrimination that the Federal Circuit lacks.

The Committee further remarked that "suits brought pursuant to the anti-discrimination laws" are explicitly exempted from "the general requirement that employees appeal to the Court of Appeals or Court of Claims." S. REP. NO. 95-969, at 63 (1978). According to the Committee, "if an employee decides to resort to district court after the [MSPB] issues a new decision and order, or reconfirms its original decision, after consideration by the Commission, *the otherwise automatic certification of the case to the Court of Appeals . . . may not go forward.*" *Id.* (emphasis added). This exception for discrimination claims appears in the text of the statute, which provides that "*except for actions filed under the antidiscrimination laws*, a petition to review a final order or decision of the Merit Systems Protection Board shall be filed in the U.S. Court of Appeals, or in the U.S. Court of Claims." H.R. REP. NO. 95-1717, at 142-43 (Conf. Rep.) (emphasis added); *see* 5 U.S.C. §§ 7703(b)(2), (c)(3).

The Conference Committee also recognized the propriety of discrimination claim review in district court. In the CSRA as enacted, an employee may both appeal an agency action to the MSPB and file a suit in district court, subject only to a waiting period:

> If the employee files an appeal of the agency action with MSPB, the employee may file suit in district court any time after 120 days if the Board has not completed action on the matter by that time . . . . [T]he act gives the employee the right to sue in district court 180 days after it petitions the EEOC to review the decision of the MSPB even if the administrative process is not completed by that time, as required by other provisions in the section.

H.R. REP. NO. 95-1717, at 141 (Conf. Rep.).

In its review of the CSRA since its passage, Congress has continued to support the right to *de novo* review of discrimination claims in district court. In 1982, for example, Congress revisited the CSRA when creating the Federal Circuit. Despite the push in Congress to further streamline appeals and to eliminate duplication, Congress maintained the statute's method of sending federal employment discrimination cases to federal district court.

The push for reform is apparent from the Senate Committee on the Judiciary's report recommending the Federal Courts Improvement Act. The report explained:

> In recent years, much confusion has been engendered by provisions of existing law that leave unclear which of two or more federal courts [] have subject matter jurisdiction over certain categories of civil actions. The problem has been particularly acute in the area of administrative law where misfilings [sic] and

> dual filings have become commonplace. The uncertainty *in some statutes* regarding which court has review authority creates an unnecessary risk that a litigant may find himself without a remedy because of a lawyer's error or a technicality of procedure.

S. REP. NO. 97-275, at 11 (1981) (emphasis added).

Congress' dissatisfaction with the confusing language of "some statutes" did not extend to the provisions for review of discrimination cases in the CSRA, as demonstrated by its lack of substantive changes to the statute. Aside from technical amendments to conform the CSRA to the Federal Circuit's existence, Congress made no changes through the Federal Courts Improvement Act to the path of review for discrimination cases. A hearing on the merits with *de novo* review in a district court is still available to employees who bring discrimination claims.

II. ENFORCING FEDERAL EMPLOYEES' RIGHTS TO TRIAL *DE NOVO* FOR DISCRIMINATION CLAIMS IN FEDERAL DISTRICT COURT FOSTERS USE OF THE ADMINISTRATIVE PROCESS AND DETERS A RUSH TO DISTRICT COURT.

Preserving the right to trial *de novo* of mixed cases in the federal district court furthers the interest of justice and fairness for claimants alleging unlawful discrimination. Failing to safeguard this right would have significant negative policy repercussions. A rule of law limiting access to trial *de novo* and excluding claims

dismissed by the MSPB on jurisdictional grounds from this statutorily prescribed remedy would result in three undesired outcomes: (1) it would encourage employees to bypass the administrative procedures set up by Congress in the CSRA to avoid the risk of being detoured into Federal Circuit proceedings; (2) it would unfairly punish employees for failing to navigate a "procedural maze," at times through no fault of their own; and (3) it would result in an illogical and erroneous interpretation of the CSRA that would deny any merits trial on employees' discrimination claims.

A. Denial of *de novo* review harms federal employees who use the CSRA's MSPB appeal process, creating an incentive to avoid the MSPB altogether due to the risks of denial of a merits hearing.

The CSRA offers employees a way to handle adverse federal employment issues, including those of discrimination, without necessarily having to retain legal counsel and ending up in federal district court. For example, comparing MSPB administrative hearings to court litigation under the Tucker Act, Justice Blackmun noted:

> An employee who is entitled to seek relief before the MSPB will have the opportunity to proceed in a far less formal atmosphere, without paying filing fees and other costs. Because the proceedings are less formal, the employee may be able to present his or her case

> competently without the assistance of an attorney.

See United States v. Fausto, 484 U.S. 439, 467 (1988) (Blackmun, J., concurring).

The opportunity for the MSPB to serve as a simplified administrative hearings venue (subject to *de novo* judicial review under the CSRA's statutory scheme) is thwarted if that judicial review process is subject to an additional complex step of possible appeals to the Federal Circuit. Additionally, the Federal Circuit's focus in its review is on the civil service law merits of the MSPB's decision to dismiss; nothing with regard to the employee's discrimination claim is subject to review by the Federal Circuit following a jurisdictional dismissal. These factors create a perverse incentive to drive cases out of the less formal administrative hearings process at the MSPB and into the district courts due to the risk of denial of a merits hearing, doing violence to the CSRA's integrated statutory scheme.

B. *De novo* review ensures that employees are not punished for failing to navigate a "procedural maze."

Both this Court and the lower courts have recognized the complexity involved in successfully navigating a mixed case through the CSRA's administrative requirements. As this Court observed in *Kloeckner*, "the intersection of federal civil rights statutes and civil

service law has produced a complicated, at times confusing, process for resolving claims of discrimination in the federal workplace." *Kloeckner*, 133 S. Ct. at 603. The Sixth Circuit has unfavorably described the process as a "procedural maze" and a "procedural morass." *Valentine-Johnson v. Roche*, 386 F.3d 800, 802, 805 (6th Cir. 2004). The D.C. Circuit has also labeled the navigation of the procedural process of the CSRA in mixed cases as a "complicated tapestry." *Id.* at 805 (quoting *Butler v. West*, 164 F.3d 634, 638-39 (D.C. Cir. 1999)). Lay federal employees initiating discrimination claims under the CSRA must deal with this complexity. As just one example of this procedural morass, a document entitled "Guide for *Pro Se* Petitioners and Appellants," found on the website for the U.S. Court of Appeals for the Federal Circuit, directs mixed case appellants who wish to preserve their federal discrimination claims to appeal a MSPB decision to the district court.[7]

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[7] This guide expressly states that the Federal Circuit "does not have jurisdiction to review cases involving bona fide claims of discrimination based on race, sex, age, national origin, or handicap that were raised before and considered by the Merit Systems Protection Board. If your case involves such claims and you are unwilling to abandon them forever, you must proceed in a district court (which will hear all your claims, both discrimination and nondiscrimination) or before the Equal Employment Opportunity Commission (which will hear your discrimination claims only)." *Guide for Pro Se Petitioners and Appellants*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/pro%20se.pdf (Last visited February 20, 2017).

The Court has repeatedly noted that complex remedial systems "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 403 (2008) (citing *EEOC v. Commercial Office Prods. Co.*, 468 U.S. 107, 124 (1988)) (discussing the ADEA and Title VII "remedial schemes in which laypersons, rather than lawyers, are expected to initiate the process").[8] When employees appeal their cases to the MSPB under the "guidance" of the CSRA, they likely have little understanding of the CSRA's procedural requirements. As *Amicus* has observed, a substantial portion of employees in mixed cases proceed *pro se*. Congress intended the CSRA to protect the right of federal employees to assert discrimination claims.[9] Mechanisms to help abate some of that complexity in the interest of ensuring that mixed cases are heard on their merits are even built into the statute. *See, e.g.*, 5 U.S.C. § 7702(f) (savings provision for timeliness purposes for cases of erroneous filing in the incorrect forum). To punish, often *pro se*, federal employees who cannot grasp the statute's mechanisms – mechanisms which are sufficiently complex as to even challenge the courts at times – would undermine Congress' express intent.

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[8] As the Court observed, nothing in the record indicates that Congress intended federal employees to obtain counsel to navigate the process in the private sector. Thus, the same standard can be applied to the federal sector.

[9] *See supra* Section I.

Federal employees may be faultless in the events that culminate in the MSPB's jurisdictional dismissal of their claims. For example, in *Valentine-Johnson*, the appellant failed to meet the procedural requirements of a mixed case "because of erroneous advice given to her by the MSPB Administrative Judge . . . hearing her claims." *See Valentine-Johnson*, 386 F.3d at 802.[10] Specifically, the Administrative Judge (AJ) informed Valentine-Johnson that she could terminate her proceedings before the MSPB and proceed directly to federal district court. When Valentine-Johnson followed this instruction, the district court dismissed her claim for her failure to exhaust her administrative remedies with the MSPB. On appeal, the Sixth Circuit held that "principles of equity require that Valentine-Johnson's termination claim be heard in the district court." *Id.* at 811-12.

In *Harms v. I.R.S.*, the appellant's claim was dismissed because he failed to re-file his appeal to the MSPB immediately after regaining mental competency. *See Harms v. I.R.S.*, 321 F.3d 1001 (10th Cir. 2003). Harms was "involuntarily institutionalized," so the AJ dismissed his complaint without prejudice and set a date by which the complainant was required to re-file. *Id.* at 1004. If Harms was still not competent to file by this "re-file date," the AJ stated that Harms

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[10] *Amicus* recognizes that both *Valentine-Johnson* and *Harms* (discussed further *infra*) involved the appeal of procedural dismissals by the MSPB. However, an appellant whose claim was dismissed on jurisdictional grounds runs the same risk of an inequitable outcome as an appellant whose claim was dismissed on procedural grounds, as in these two cases.

could re-file after he regained mental competency. *Id.* Harms was not mentally competent as of the re-file date, so Harms re-filed after regaining competency. However, the AJ expected Harms to re-file his claim on the same day that he began taking anti-psychotic drugs again. *Id.* at 1005. Harms failed to do so, thus the AJ dismissed Harms' claim as untimely. Notably, the Tenth Circuit in *Harms* also rejected the Federal Circuit's pre-*Kloeckner* approach, and found that district court had jurisdiction for *de novo* hearing after MSPB dismissal even if the MSPB did not issue a merits determination on discrimination, so long as the employee alleged discrimination. *See id.* at 1008.

As *Valentine-Johnson* and *Harms* demonstrate, employee discrimination claims can be dismissed by the MSPB for a variety of reasons, some completely devoid of employee fault. If the CSRA's language guaranteeing *de novo* review of discrimination claims on appeal from the MSPB is to be honored in both letter and spirit, then an employee's failure to understand the CSRA's nuances should not preclude merits review.

Congress did not intend for a federal employee's right to a *de novo* trial in federal district court, when he alleges a mixed case claim, to depend on whether he guessed correctly on whether a possible dismissal would be on the merits, on a procedural technicality, or because of the amorphous concept of subject matter jurisdiction. Even experienced attorneys grapple with

this concept.[11] The process was intended to be a simplified process most often used by federal employees without the assistance of counsel. *See Holowecki*, 552 U.S. at 403.

The *Kloeckner* Court found that the government provided no reasoning which demonstrates Congress intended to create a "roundabout way of bifurcating judicial review" when it passed the CSRA. *Kloeckner*, 133 S. Ct. at 605. The Court's decision in *Kloeckner* put emphasis on the "judicially reviewable action" language of § 7702 of the CSRA, not whether that judicially reviewable action was procedural or jurisdictional. *Id.* The Court held that the first sentence of § 7703(b)(2) sends mixed cases to district court, and in doing so recognized that, contrary to the assertions of the federal government, the term "judicially reviewable action" was not a term of art. *Id.* Because it is not a term of art, the distinction between whether a mixed case was dismissed on procedural or jurisdictional grounds does not change which court the case should be sent to for review, as a dismissal based on either ground is a judicially reviewable action, a point the Federal Circuit overlooked in its decision in *Conforto v. MSPB*, 713 F.3d 1111 (Fed. Cir. 2013).

Instead of recognizing the Court's focus in *Kloeckner*, the majority in *Conforto* read the Court's decision

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[11] *See* Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1 (2015) (explaining how difficult jurisdictional issues are generally).

on narrow grounds as concerning only procedural decisions. *Id.* at 1117. Not only does this run counter to the holding of *Kloeckner*, but both parties in *Kloeckner* recognized that there was no difference between procedural and jurisdictional decisions by the MSPB. Brief for Respondent at 25 n.3, *Kloeckner*, 133 S. Ct. 596 (2012) (stating that there was "no basis" in differentiating which court had review); Reply Brief for Petitioner at 2, *Kloeckner*, 133 S. Ct. 596. The dissent in *Conforto* noted that the majority disregarded this point, and also noted that the MSPB often dismisses cases using alternate grounds, meaning a case could be dismissed for *both* procedural and jurisdictional reasons. *Conforto*, 713 F.3d at 1124 (Dyk, J., dissenting). If the Court were to endorse the view that procedural appeals in mixed cases can go to district court but jurisdictional appeals can only be brought to the Federal Circuit, the practical effect would be to render unintelligible an already difficult system for plaintiffs to navigate.

The Court should not impose additional hurdles that hamper federal employees' rights to have their discrimination claims heard *de novo* in federal district court. Accordingly, *Amicus* requests that this Court reject the approach of the Federal Circuit in *Conforto* and of the D.C. Circuit below as contrary to *Kloeckner*.

C. *De novo* review in district court prevents an illogical and unintended outcome – discrimination claims being denied any trial on the merits.

In Petitioner's case, if the MSPB had decided the merits of the claim, Petitioner could have had the merits re-visited by appealing to federal district court and receiving *de novo* review. The MSPB failed to reach the merits of Petitioner's discrimination claim, however, instead dismissing the claim for lack of jurisdiction. Petitioner was permitted to appeal only the jurisdictional dismissal of his claim to the Federal Circuit, where *de novo* review is unavailable. Petitioner, therefore, has received no trial on the merits of his claim.

This result is not only illogical but also distorts the CSRA's language and intent. If the Federal Circuit upholds the MSPB's decision, then an employee whose claim is dismissed on jurisdictional grounds will never have the merits of the discrimination claim addressed, an outcome the Court rejected in *Kloeckner*. This result contradicts the language of the CSRA, which states that "in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial *de novo* by the reviewing court." 5 U.S.C. § 7703(c).

III. THE COURT SHOULD CONFIRM THAT *KLOECKNER* DOES NOT RESTRICT AN EMPLOYEE'S OTHER REVIEW RIGHTS PROVIDED UNDER THE CSRA AND ITS REGULATIONS.

The CSRA creates an administrative process that the government encourages, and sometimes directs, employees to utilize. Employees may wish to pursue resolution through these administrative remedies before resorting to litigation. Under the CSRA, employees are either directed to exhaust their administrative options first or are permitted to proceed to federal court without exhausting them. Employees are never directed nor encouraged to bypass the administrative process.

To avoid unnecessary confusion and possible future litigation, *Amicus* asks that the Court confirms that nothing in *Kloeckner* should be understood to restrict the right of federal employees with mixed case complaints to pursue further administrative remedies after receiving an unsatisfactory result from the MSPB – regardless of whether the MSPB's dismissal is based upon a ruling on the merits, a dismissal on jurisdictional grounds, or a dismissal on procedural grounds.

If a mixed case is dismissed by the MSPB on jurisdictional grounds, 29 C.F.R. § 1614.302[12] explicitly

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[12] 29 C.F.R. § 1614 was promulgated by the EEOC pursuant to its authority under 42 U.S.C. § 2000e-16(b) to "issue such rules,

gives federal employees the option of *de novo* review in federal district court. The regulations also require MSPB judges who dismiss mixed case complaints to advise employees that they may appeal the MSPB's rulings on discrimination issues to the EEOC as well. *Kloeckner* does not diminish the employees' rights to review provided in 29 C.F.R. § 1614.302.

Administrative hearings in the federal sector complaints process evolved over time; the administrative hearings process came first, and judicial review *de novo* in district court was added later.[13] The later enacted provision of judicial review in the CSRA was meant to supplement, not replace, this administrative

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regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." Accordingly, as the Department of Justice's Office of Legal Counsel has held, these procedural regulations are distinct from the policy guidance accorded mere *Skidmore* deference under *EEOC v. Arabian American Oil Co., et al.*, 499 U.S. 244, 257 (1991), and should instead be accorded *Chevron* deference. *See* Legality of EEOC Class Action Regulations, Memorandum Opinion for the Vice President and the General Counsel of the United States Postal Service, 28 Op. O.L.C. 254, 261 n.3 (2004), https://www.justice.gov/file/18816/download; *accord*, Sant'Ambrogio, Michael D. and Zimmerman, Adam S., *Inside the Agency Class Action* (August 21, 2016). Yale Law Journal, Forthcoming; Loyola Law School, Los Angeles Legal Studies Research Paper No. 2016-32, at n.84, https://ssrn.com/abstract=2827187.

[13] As detailed by the EEOC in the historical portion of its Management Directive 110 (MD-110), the antecedents to the administrative hearings process predate Congress' passage of the major EEO statutes by several decades. *See* MD-110, Preamble, § I, https://www.eeoc.gov/federal/directives/md-110_preamble.cfm.

hearings process after a history of problematic implementation under the former Civil Service Commission. *See supra* at n.13.

As this Court has long recognized, Congress designed the CSRA as "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *See Fausto*, 484 U.S. at 445. 29 C.F.R. § 1614.302 is a crucial part of implementing Congress' integrated scheme under the CSRA, as it ensures that the administrative hearings process is allowed to occur in some forum (whether it be the EEOC or the MSPB), subject to *de novo* judicial review in federal district court.

The Court in *Kloeckner* described the CSRA as routing mixed cases dismissed on procedural grounds to federal district court in "crystalline fashion." *Kloeckner*, 133 S. Ct. at 604. This language reinforces the Court's holding that the relevant discrimination statutes route these dismissals to federal district court rather than an appellate court. This language does not preempt the availability of an administrative hearing first, then later subject to *de novo* judicial review in federal district court. Accordingly, *Amicus* asks the Court to confirm that, prior to the case being subject to *de novo* judicial review in federal district court, federal employees retain their right under the CSRA to an administrative hearing before a tribunal of competent jurisdiction.

It appears that Petitioner's decision to appeal the MSPB's decision below was driven by the notice of appeal rights provided to him by the MSPB below. *See Perry v. Dept. of Commerce*, MSPB Docket Nos. DC-0752-12-0486-B-1, DC-0752-12-0487-B-1 (2014), Pet. App. 30a-31a. That notice solely referenced review in the Federal Circuit. It did not discuss the possibility of district court review or of seeking a hearing at the EEOC under 29 C.F.R. § 1614.302. *See id.* The MSPB's appeal rights notice provided to Perry followed the MSPB's split decision in *Cunningham*. *See Perry*, Pet. App. 29a-30a at ¶ 11.

In *Cunningham*, the MSPB recognized that its prior practice of only notifying employees of their right to seek review in the Federal Circuit ran counter to *Kloeckner*. *See Cunningham v. Dept. of the Army*, 119 M.S.P.R. 147, ¶¶ 10-14 (2013). Despite this recognition, the MSPB majority still directed employees to the Federal Circuit and not the district court, even in cases alleging discrimination, if the MSPB determined that it lacked jurisdiction. *See id.* at ¶ 14. MSPB Vice Chair Wagner, in her concurrence, explained that under *Kloeckner* all employees who alleged discrimination should receive appeal rights, directing appeals to district court, not the Federal Circuit. *See id.* (Wagner, Vice Chair, concurring). *Amicus* requests that the Court confirm, consistent with *Kloeckner*, that the MSPB should include both the district court option and the EEOC administrative hearing option of 29 C.F.R. § 1614.302 in its notices of appeal rights for

all mixed cases (whether or not the MSPB finds jurisdiction).

CONCLUSION

For the foregoing reasons, the *amicus curiae* filing this brief in support of Petitioner Anthony W. Perry respectfully requests that this Honorable Court reverse the judgment of the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted on March 3, 2017,

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